

IN THE SUPREME COURT OF INDIA
WRIT PETITION (CIVIL) No. 829 OF 2013

S.G. VOMBATKERE & ANR.

.... PETITIONERS

VERSUS

UNION OF INDIA & ORS.

.... RESPONDENTS

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REPORTABLE
IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

WRIT PETITION (CIVIL) NO.494 OF 2012

Justice K.S. Puttaswamy (Retd.) & Another ... Petitioners

Versus

Union of India & Others ... Respondents

WITH

TRANSFERRED CASE (CIVIL) NO.151 OF 2013

TRANSFERRED CASE (CIVIL) NO.152 OF 2013

WRIT PETITION (CIVIL) NO.829 OF 2013

WRIT PETITION (CIVIL) NO.833 OF 2013

WRIT PETITION (CIVIL) NO.932 OF 2013

TRANSFER PETITION (CIVIL) NO.312 OF 2014

TRANSFER PETITION (CIVIL) NO.313 OF 2014

WRIT PETITION (CIVIL) NO.37 OF 2015

WRIT PETITION (CIVIL) NO.220 OF 2015

TRANSFER PETITION (CIVIL) NO.921 OF 2015

CONTEMPT PETITION (CIVIL) NO.144 OF 2014 IN WP(C) 494/2012

CONTEMPT PETITION (CIVIL) NO.470 OF 2015 IN WP(C) 494/2012

ORDER

1. In this batch of matters, a scheme propounded by the

Government of India popularly known as "Aadhaar Card Scheme" is

under attack on various counts. For the purpose of this order, it is

Signature Invalid

Digitally signed by
Deepak Khanna
Date: 17.02.2016
Reason:

It is not necessary for us to go into the details of the nature of the scheme

and the various counts on which the scheme is attacked. Suffice it to say that under the said scheme the Government of India is collecting and compiling both the demographic and biometric data of the residents of this country to be used for various purposes, the details of which are not relevant at present.

2. One of the grounds of attack on the scheme is that the very collection of such biometric data is violative of the "right to privacy". Some of the petitioners assert that the right to privacy is implied under Article 21 of the Constitution of India while other petitioners assert that such a right emanates not only from Article 21 but also from various other articles embodying the fundamental rights guaranteed under Part-III of the Constitution of India.

3. When the matter was taken up for hearing, Shri Mukul Rohatgi, learned Attorney General made a submission that in view of the judgments of this Court in ***M.P. Sharma & Others v. Satish Chandra & Others***, AIR 1954 SC 300 and ***Kharak Singh v. State of U.P. & Others***, AIR 1963 SC 1295, (decided by *Eight* and *Six* Judges respectively) the legal position regarding the existence of the fundamental right to privacy is doubtful. Further, the learned Attorney General also submitted that in a catena of decisions of this Court rendered subsequently, this Court referred to "right to privacy", contrary to the judgments in the abovementioned cases which resulted

in a jurisprudentially impermissible divergence of judicial opinions.

“A power of search and seizure is in any system of jurisprudence an overriding power of the State for the protection of social security and that power is necessarily regulated by law. When the Constitution makers have thought fit not to subject such regulation to constitutional limitations **by recognition of a fundamental right to privacy**, analogous to the American Fourth Amendment, **we have no justification to import it, into a totally different fundamental right**, by **some process of strained construction**. [See: *M.P. Singh & Others v. Satish Chandra & Others*, AIR 1954 SC 300, page 306 para 18]

“... Nor do we consider that Art. 21 has any relevance in the context as was sought to be suggested by learned counsel for the petitioner. As already pointed out, **the right of privacy is not a guaranteed right under our Constitution** and therefore the attempt to ascertain the movement of an individual which is merely a manner in which privacy is invaded is not an infringement of a fundamental right guaranteed by Part III.” [See: *Kharak Singh v. State of U.P. & Others*, AIR 1963 SC 1295, page 1303 para 20]

[Emphasis supplied]

4. Learned Attorney General submitted that such impermissible divergence of opinion commenced with the judgment of this Court in ***Gobind v. State of M.P. & Another***, (1975) 2 SCC 148, which formed the basis for the subsequent decision of this Court wherein the “right to privacy” is asserted or at least referred to. The most important of such cases are ***R. Rajagopal & Another v. State of Tamil Nadu & Others***, (1994) 6 SCC 632 (popularly known as *Auto Shanker’s* case) and ***People’s Union for Civil Liberties (PUCL) v. Union of India & Another***, (1997) 1 SCC 301.

5. All the judgments referred to above were rendered by smaller Benches of two or three Judges.

6. Shri K.K. Venugopal, learned senior counsel appearing for one of

the respondents submitted that the decision of this Court in **Gobind** (*supra*) is not consistent with the decisions of this Court in **M.P. Sharma** and **Kharak Singh**. He submitted that such divergence is also noticed by the academicians, Shri F.S. Nariman, Senior Advocate of this Court and Shri A.M. Bhattacharjee¹, Former Chief Justice, High Court at Calcutta and High Court at Bombay.

7. Therefore, it is submitted by the learned Attorney General and Shri Venugopal that to settle the legal position, this batch of matters is required to be heard by a larger Bench of this Court as these matters throw up for debate important questions – (i) whether there is any “right to privacy” guaranteed under our Constitution. (ii) If such a right exists, what is the source and what are the contours of such a right as there is no express provision in the Constitution adumbrating the right to privacy. It is therefore submitted that these batch of matters are required to be heard and decided by a larger bench of at least five Judges in view of the mandate contained under Article 145(3)² of the Constitution of India.

¹

A.M. Bhattacharjee, *Equality, Liberty & Property under the Constitution of India*. (Eastern Law House, New Delhi, 1997)

² Article 145(3). The minimum number of Judges who are to sit for the purpose of deciding any case involving a substantial question of law as to the interpretation of this Constitution or for the purpose of hearing any reference under Article 143 shall be five:
Provided that, where the Court hearing an appeal under any of the provisions of this chapter other than Article 132 consists of less than five Judges and in the course of the hearing of the appeal the Court is satisfied that the appeal involves a substantial question of law as to the interpretation of this Constitution the determination of which is

8. On behalf of the petitioners Shri Gopal Subramaniam and Shri Shyam Divan, learned senior counsel very vehemently opposed the suggestion that this batch of matters is required to be heard by a larger bench. According to them:

(i) The conclusions recorded by this Court in **R. Rajagopal** and **PUCL** are legally tenable for the reason that the observations made in **M.P. Sharma** regarding the absence of right to privacy under our Constitution are not part of ratio decidendi of that case and, therefore, do not bind the subsequent smaller Benches.

(ii) Coming to the case of **Kharak Singh**, majority in **Kharak Singh** did hold that the right of a person not to be disturbed at his residence by the State and its officers is recognized to be a part of a fundamental right guaranteed under Article 21 which is nothing but an aspect of privacy. The observation in para 20 of the majority judgment at best can be construed only to mean that there is no fundamental right of privacy against the State's authority to keep surveillance on the activities of a person. Even such a conclusion cannot be good law any more in view of the express declaration made by a seven-Judge bench decision of this Court in **Maneka Gandhi v. Union of India & Another**, (1978) 1 SCC 248³.

necessary for the disposal of the appeal, such Court shall refer the question for opinion to a Court constituted as required by this clause for the purpose of deciding any case involving such a question and shall on receipt of the opinion dispose of the appeal in conformity with such opinion

³ Para 5. .. It was in **Kharak Singh v. State of U.P.**, AIR 1963 SC 1295 that the question as to the proper scope and meaning of the expression 'personal liberty' came up pointedly for consideration for the first time before this Court. The

(iii) They further argued that both **M.P. Sharma** (*supra*) and **Kharak Singh** (*supra*) came to be decided on an interpretation of the Constitution based on the principles expounded in **A.K. Gopalan v. State of Madras**, AIR 1950 SC 27. Such principles propounded by **A.K. Gopalan** themselves came to be declared wrong by a larger Bench of this Court in **Rustom Cavasjee Cooper v. Union of India**, (1970) 1 SCC 248. Therefore, there is no need for the instant batch of matters to be heard by a larger Bench.

9. It is true that **Gobind** (*supra*) did not make a clear declaration that there is a right to privacy flowing from any of the fundamental rights guaranteed under Part-III of the Constitution of India, but observed that "Therefore, even assuming that the right to personal liberty, the right to move freely throughout the territory of India and the freedom of speech create an independent right of privacy as an emanation from them which one can characterize as a fundamental right, we do not think that the right is absolute". This Court proceeded to decide the case on such basis.

10. However, the subsequent decisions in **R. Rajagopal** (*supra*) and

majority of the Judges took the view "that 'personal liberty' is used in the article as a compendious term to include within itself all the varieties of rights which go to make up the 'personal liberties' of man other than those dealt with in the several clauses of Article 19(1). In other words, while Article 19(1) deals with particular species or attributes, of that freedom, 'personal liberty' in Article 21 takes in and comprises the residue". The minority judges, however, disagreed with this view taken by the majority and explained their position in the following words: "No doubt the expression 'personal liberty' is a comprehensive one and the right to move freely is an attribute of personal liberty. It is said that the freedom to move freely is carved out of personal liberty and, therefore, the expression 'personal liberty' in Article 21 excludes that attribute. In our view, this is not a correct approach. Both are independent fundamental rights, though there is overlapping. There is no question of one being carved out of another. The fundamental right of life and personal liberty has many attributes and some of them are found in Article 19. If a person's fundamental right under Article 21 is infringed, the State can rely upon a law to sustain the action, but that cannot be a complete answer unless the said law satisfies the test laid down in Article 19(2) so far as the attributes covered by Article 19(1) are concerned". There can be no doubt that in view of the decision of this Court in **R. C. Cooper v. Union of India**, (1970) 2 SCC 298 the minority view must be regarded as correct and the majority view must be held to have been overruled.

PUCL (*supra*), the Benches were more categorical in asserting the existence of “right to privacy”. While **R. Rajagopal’s case**⁴ held that the “right to privacy” is implicit under Article 21 of the Constitution, **PUCL’s case** held that the “right to privacy” insofar as it pertains to speech is part of fundamental rights under Articles 19(1)(a) and 21 of the Constitution⁵.

11. Elaborate submissions are made at the bar by the learned counsel for the petitioners to demonstrate that world over in all the countries where Anglo-Saxon jurisprudence is followed, ‘privacy’ is recognised as an important aspect of the liberty of human beings. It is further submitted that it is too late in the day for the Union of India to argue that the Constitution of India does not recognise privacy as an aspect of the liberty under Article 21 of the Constitution of India. At least to the extent that the right of a person to be secure in his house and not to be disturbed unreasonably by the State or its officers is

⁴ Para 9. “Right to privacy is not enumerated as a fundamental right in our Constitution but has been inferred from Article 21.”

⁵ Para 18. “The right to privacy — by itself — has not been identified under the Constitution. As a concept it may be too broad and moralistic to define it judicially. Whether right to privacy can be claimed or has been infringed in a given case would depend on the facts of the said case. But the right to hold a telephone conversation in the privacy of one’s home or office without interference can certainly be claimed as “right to privacy”. Conversations on the telephone are often of an intimate and confidential character. Telephone conversation is a part of modern man’s life. It is considered so important that more and more people are carrying mobile telephone instruments in their pockets. Telephone conversation is an important facet of a man’s private life. Right to privacy would certainly include telephone conversation in the privacy of one’s home or office. Telephone-tapping would, thus, infract Article 21 of the Constitution of India unless it is permitted under the procedure established by law.

19. Right to freedom of speech and expression is guaranteed under Article 19(1)(a) of the Constitution. This freedom means the right to express one’s convictions and opinions freely by word of mouth, writing, printing, picture, or in any other manner. When a person is talking on telephone, he is exercising his right to freedom of speech and expression. Telephone-tapping unless it comes within the grounds of restrictions under Article 19(2) would infract Article 19(1)(a) of the Constitution.”

expressly recognized and protected in **Kharak Singh** (*supra*) though the majority did not describe that aspect of the liberty as a right of privacy, it is nothing but the right of privacy.

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12. We are of the opinion that the cases on hand raise far reaching questions of importance involving interpretation of the Constitution. What is at stake is the amplitude of the fundamental rights including that precious and inalienable right under Article 21. If the observations made in **M.P. Sharma** (*supra*) and **Kharak Singh** (*supra*) are to be read literally and accepted as the law of this country, the fundamental rights guaranteed under the Constitution of India and more particularly right to liberty under Article 21 would be denuded of vigour and vitality. At the same time, we are also of the opinion that the institutional integrity and judicial discipline require that pronouncement made by larger Benches of this Court cannot be ignored by the smaller Benches without appropriately explaining the reasons for not following the pronouncements made by such larger Benches. With due respect to all the learned Judges who rendered the subsequent judgments - where right to privacy is asserted or referred to their Lordships concern for the liberty of human beings, we are of the humble opinion that there appears to be certain amount of apparent unresolved contradiction in the law declared by this Court.

13. Therefore, in our opinion to give a quietus to the kind of

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controversy raised in this batch of cases once for all, it is better that the ratio decidendi of **M.P. Sharma** (*supra*) and **Kharak Singh** (*supra*) is scrutinized and the jurisprudential correctness of the subsequent decisions of this Court where the right to privacy is either asserted or referred be examined and authoritatively decided by a Bench of appropriate strength.

14. We, therefore, direct the Registry to place these matters before the Hon'ble the Chief Justice of India for appropriate orders.

.....J.
(J. Chelameswar)

.....J.
(S.A. Bobde)

.....J.
(C. Nagappan)

New Delhi
August 11, 2015

REPORTABLE
IN THE SUPREME COURT OF INDIA
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WRIT PETITION (CIVIL) NO.494 OF 2012

Justice K.S. Puttaswamy (Retd.) & Another ...Petitioners

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Union of India & Others

... Respondents

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ORDER

Having regard to importance of the matter, it is desirable that the matter be heard at the earliest.

.....J.
(J. Chelameswar)

.....J.
(S.A. Bobde)

.....J.
(C. Nagappan)

New Delhi
August 11, 2015

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I N T E R I M O R D E R

After the matter was referred for decision by a larger Bench, the learned counsel for the petitioners prayed for further interim orders. The last interim order in force is the order of this Court dated 23.9.2013 which reads as follows:-

“....

All the matters require to be heard finally. List all matters for final hearing after the Constitution Bench is over.

In the meanwhile, no person should suffer for not getting the Aadhaar card inspite of the fact that some authority had issued a circular making it mandatory and when any person applies to get the Aadhaar card voluntarily, it may be checked whether that person is entitled for it under the law and it should not be given to any illegal immigrant.”

It was submitted by Shri Shyam Divan, learned counsel for the petitioners that the petitioners having pointed out a serious breach of privacy in their submissions, preceding the reference, this Court may grant an injunction restraining the authorities from proceeding further in the matter of obtaining biometrics etc. for an Aadhaar card. Shri Shyam Divan submitted that the biometric information of an individual can be circulated to other authorities or corporate bodies which, in turn can be used by them for commercial exploitation and, therefore, must be stopped.

The learned Attorney General pointed out, on the other hand, that this Court has at no point of time, even while making the interim order dated 23.9.2013 granted an injunction restraining the Unique Identification Authority of India from going ahead and obtaining biometric or other information from a citizen for the purpose of a Unique Identification Number, better known as “Aadhaar card”. It was further submitted that the respondents have gone ahead with the project and have issued Aadhaar cards to

about 90% of the population. Also that a large amount of money has been spent by the Union Government on this project for issuing Aadhaar cards and that in the circumstances, none of the well-known considerations for grant of injunction are in favour of the petitioners.

The learned Attorney General stated that the respondents do not share any personal information of an Aadhaar card holder through biometrics or otherwise with any other person or authority. This statement allays the apprehension for now, that there is a widespread breach of privacy of those to whom an Aadhaar card has been issued. It was further contended on behalf of the petitioners that there still is breach of privacy. This is a matter which need not be gone into further at this stage.

The learned Attorney General has further submitted that the Aadhaar card is of great benefit since it ensures an effective implementation of several social benefit schemes of the Government like MGNREGA, the distribution of food, ration and kerosene through PDS system and grant of subsidies in the distribution of LPG. It was, therefore, submitted that restraining the respondents from issuing further Aadhaar cards or fully utilising the existing Aadhaar cards for the social schemes of the Government should be allowed.

The learned Attorney General further stated that the

respondent Union of India would ensure that Aadhaar cards would only be issued on a consensual basis after informing the public at large about the fact that the preparation of Aadhaar card involving the parting of biometric information of the individual, which shall however not be used for any purpose other than a social benefit schemes.

Having considered the matter, we are of the view that the balance of interest would be best served, till the matter is finally decided by a larger Bench if the Union of India or the UIDA proceed in the following manner:-

1. The Union of India shall give wide publicity in the electronic and print media including radio and television networks that it is not mandatory for a citizen to obtain an Aadhaar card;
2. The production of an Aadhaar card will not be condition for obtaining any benefits otherwise due to a citizen;
3. The Unique Identification Number or the Aadhaar card will not be used by the respondents for any purpose other than the PDS Scheme and in particular for the purpose of distribution of foodgrains, etc. and cooking fuel, such as kerosene. The Aadhaar card may also be used for the purpose of the LPG Distribution Scheme;
4. The information about an individual obtained by the Unique

Identification Authority of India while issuing an Aadhaar card shall not be used for any other purpose, save as above, except as may be directed by a Court for the purpose of criminal investigation.

Ordered accordingly.

.....J.
(J. Chelameswar)

.....J.
(S.A. Bobde)

.....J.
(C. Nagappan)

New Delhi
August 11, 2015

ITEM NO.1

COURT NO.6

SECTION PIL(W)/XVIA

S U P R E M E C O U R T O F I N D I A
R E C O R D O F P R O C E E D I N G S

Writ Petition(s) (Civil) No(s). 494/2012

JUSTICE K.S.PUTTASWAMY (RETD) & ANR

Petitioner(s)

VERSUS

UNION OF INDIA & ORS.

Respondent(s)

(With appln(s) for stay, impleadment, clarification/modification of Court's order, intervention, directions, impleadment, permission to file additional documents and office report)
(For Final Disposal)

WITH

T.C. (C) No. 151/2013

(With impleadment as party respondent and modification of Court's order)

T.C. (C) No. 152/2013

W.P. (C) No. 829/2013

(With appln.(s) for impleadment and impleadment/directions and interim relief and office report)

W.P. (C) No. 833/2013

(With appln.(s) for impleadment and appln.(s) for permission to file additional documents and Office Report)

W.P. (C) No. 932/2013

(With appln.(s) for directions and interim directions and Office Report)

T.P. (C) No. 312/2014

(With Office Report)

T.P. (C) No. 313/2014

(With Office Report)

W.P. (C) No. 37/2015

(With amendment of memo of parties and interim stay and permission to file additional documents and office report)

W.P. (C) No. 220/2015

(Directions)

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T.P.(C) No. 921/2015
(Office report)

Contempt Petition(C) No. 144/2014 in W.P.(C) No. 494/2012
(Directions)

Contempt Petition(C) No. 470/2015 in W.P.(C) No. 494/2012
(With appln(s) for exemption from filing O.T.)

Date : 11/08/2015 These petitions were called on for
pronouncement of orders today.

CORAM :

HON'BLE MR. JUSTICE J. CHELAMESWAR
HON'BLE MR. JUSTICE S.A. BOBDE
HON'BLE MR. JUSTICE C. NAGAPPAN

For Petitioner(s)

WP(C) No. 829/2013 Mr. Shyam Divan, Sr. Adv.
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Ms. Niharika, Adv.
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 Mr. S.S. Rawat, Adv.
 Mr. D.S. Mahra, Adv.

TC(C) No. 152/2013 Ms. Meenakshi Arora, Sr. Adv.
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 Mr. Zoheb Hossain, Adv.
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 Ms. Prerna Priyadarshini, Adv.
 Mr. Ankur Talwar, Adv.
 Ms. Nidhi, Adv.
 Ms. Savita Singh, Adv.

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 Mr. Krishna Kumar Singh, Adv.

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State of Manipur	Mr. Sapam Biswajit Meitei, Adv. Mr. Z.H. Isaac Haiding, Adv. Mr. S. Vijayanand Sharma, Adv. Mr. Ashok Kumar Singh, Adv.
State of Mizoram	Mr. K.N. Madhusoodhanan, Adv. Mr. T.G.N. Nair, Adv.

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State of Sikkim	Mr. A. Mariarputham, AG Ms. Aruna Mathur, Adv. Mr. Yusuf Khan, Adv. Mr. K. Vijay Kumar, Adv. M/s. Arputham Aruna & Co.
State of Nagaland	Ms. K. Enatoli Sema, Adv. Mr. Edward Belho, Adv. Mr. Amit Kumar Singh, Adv.
ECI	Mr. Ashok Desai, Sr. Adv. Mr. S.K. Mendiratta, Adv. Ms. Monisha Nanda, Adv. Mr. Mohit D. Ram, Adv. Mr. Sajjan Poovayya, Sr. Adv. Mr. Praveen Sehrawat, Adv. Mr. Priyadarshi Banerjee, Adv. Mr. Sarans Jain, Adv.
State of Assam	Mr. Gopal Singh, Adv. Mr. Rituraj Biswas, Adv. Ms. Rashmi Srivastava, Adv.
State of Arunachal Pradesh	Mr. Anil Shrivastav, Adv. Mr. Rituraj Biswas, Adv.
UT Chandigarh	Ms. Vimla Sinha, Adv. Mr. Gopal Singh, Adv.
State of Kerala	Mr. Jogy Scaria, Adv. Mr. Reegan S. Bel, Adv.
State of Punjab	Mr. Sanchar Anand, AAG Mr. Apoorv Singhal, Adv. Mr. Jagjit Singh Chhabra, Adv.
State of Jharkhand	Mr. Ajit Kumar Sinha, Sr. Adv. Mr. Tapes Kumar Singh, Adv. Mr. Mohd. Waquas, Adv.
State of Chhatisgarh	Mr. C.D. Singh, Adv. Ms. Sylona Mohapatara, Adv.
Govt. of Puducherry	Mr. V.G. Pragasam, Adv. Mr. Prabu Ramasubramanian, Adv.

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IA No. 5/2014 in
WP(C) no. 833/2013

Mr. Praveen Sehrawat, Adv.
Mr. Priyadarshi Banerjee, Adv.

Mr. Nikhil Nayyar, Adv.

Ms. Anitha Shenoy, Adv.

State of WB

Mr. Soumitra G. Chaudhuri, Adv.
Mr. Anip Sachthey, Adv.

State of Rajasthan

Mr. Shiv Mangal Sharma, AAG
Ms. Abhinandini Sharma, Adv.
Mr. Nishit Agrawal, Adv.
Ms. Anjali Chauhan, Adv.
Mr. Shrey Kapoor, Adv.
Mr. Saurabh Rajpal, Adv.
Mr. Milind Kumar, Adv.
Ms. Ruchi Kohli, Adv.

Mr. Aniruddha P. Mayee, Adv.

Mr. Garvesh Kabra, Adv.

State of Gujarat

Ms. Hemantika Wahi, Adv.
Ms. Jesal Wahi, Adv.
Ms. Vinakshi Kadan, Adv.

Mr. Saikrishna Rajagopal, Adv.
Mr. Arjun Ranganathan, Adv.
Ms. Julien George, Adv.

Ms. C. K. Sucharita, Adv.

Mr. Kamal Mohan Gupta, Adv.

Mr. Dinkar Kalra, Adv.

Mr. Amit Sharma, Adv.

Mr. T.G. Narayan Nair, Adv.

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UPON HEARING the Counsel The Court made the following

O R D E R

10.30 a.m.

By a reasoned order, the matters are referred to a Bench of appropriate strength.

Having regard to importance of the matter, it is desirable that the matter be heard at the earliest.

2.00 p.m.

After the matter was referred for decision by a larger Bench, the learned counsel for the petitioners prayed for further interim orders. The last interim order in force is the order of this Court dated 23.9.2013 which reads as follows:-

"....

All the matters require to be heard finally. List all matters for final hearing after the Constitution Bench is over.

In the meanwhile, no person should suffer for not getting the Aadhaar card inspite of the fact that some authority had issued a circular making it mandatory and when any person applies to get the Aadhaar card voluntarily, it may be checked whether that person is entitled for it under the law and it should not be given to any illegal immigrant."

It was submitted by Shri Shyam Divan, learned counsel for the petitioners that the petitioners having pointed out a serious breach of privacy in their submissions, preceding the reference, this Court may grant an injunction restraining the authorities from proceeding further in the matter of obtaining biometrics etc. for an Aadhaar card. Shri Shyam Divan submitted that the biometric information of an individual can be circulated to other authorities or corporate bodies which, in turn can be used by them for commercial exploitation and, therefore, must be stopped.

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The learned Attorney General pointed out, on the other hand, that this Court has at no point of time, even while making the interim order dated 23.9.2013 granted an injunction restraining the Unique Identification Authority of India from going ahead and obtaining biometric or other information from a citizen for the purpose of a Unique Identification Number, better known as "Aadhaar card". It was further submitted that the respondents have gone ahead with the project and have issued Aadhaar cards to about 90% of the population. Also that a large amount of money has been spent by the Union Government on this project for issuing Aadhaar cards and that in the circumstances, none of the well-known consideration for grant of injunction are in favour of the petitioners.

The learned Attorney General stated that the respondents do not share any personal information of an Aadhaar card holder through biometrics or otherwise with any other person or authority. This statement allays the apprehension for now, that there is a widespread breach of privacy of those to whom an Aadhaar card has been issued. It was further contended on behalf of the petitioners that there still is breach of privacy. This is a matter which need not be gone into further at this stage.

The learned Attorney General has further submitted that the Aadhaar card is of great benefit since it ensures an effective implementation of several social benefit schemes of the Government like MGNREGA, the distribution of food, ration and kerosene through PDS system and grant of subsidies in the distribution of LPG. It was, therefore, submitted that restraining the respondents from issuing further Aadhaar cards or fully utilising the existing Aadhaar cards for the social schemes of the Government should be allowed.

The learned Attorney General further stated that the respondent Union of India would ensure that Aadhaar cards would only be issued on a consensual basis after informing the public at large about the fact that the preparation of Aadhaar card involving the parting of biometric information of the individual, which shall however not be used for any purpose other than a social benefit schemes.

Having considered the matter, we are of the view that the balance of interest would be best served, till the matter is finally decided by a larger Bench if the Union of India or the UIDA proceed in the following manner:-

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1. The Union of India shall give wide publicity in the electronic and print media including radio and television networks that it is not mandatory for a citizen to obtain an Aadhaar card;
2. The production of an Aadhaar card will not be condition for obtaining any benefits otherwise due to a citizen;
3. The Unique Identification Number or the Aadhaar card will not be used by the respondents for any purpose other than the PDS Scheme and in particular for the purpose of distribution of foodgrains, etc. and cooking fuel, such as kerosene. The Aadhaar card may also be used for the purpose of the LPG Distribution Scheme;
4. The information about an individual obtained by the Unique Identification Authority of India while issuing an Aadhaar card shall not be used for any other purpose, save as above, except as may be directed by a Court for the purpose of criminal investigation.

Ordered accordingly.

(DEEPAK MANSUKHANI)
COURT MASTER

(INDU BALA KAPUR)
COURT MASTER

(Three signed reportable Orders are placed on the file)

The Gazette



of India

सत्यमेव जयते

EXTRAORDINARY
PUBLISHED BY AUTHORITY

NEW DELHI, SATURDAY, NOVEMBER 26, 1949

GOVERNMENT OF INDIA

CONSTITUENT ASSEMBLY OF INDIA
NOTIFICATION*New Delhi, the 26th November, 1949*

No. CA/83/Cons./49.—The Constitution of India as passed by the Constituent Assembly has been authenticated by the President of the Assembly by affixing his signature thereto this twenty-sixth day of November, 1949, and is hereby published for general information :—

THE CONSTITUTION OF INDIA

• WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN DEMOCRATIC REPUBLIC and to secure to all its citizens :—

JUSTICE, social, economic and political ;
LIBERTY of thought, expression, belief, faith and worship ;

EQUALITY of status and of opportunity ;
and to promote among them all

FRATERNITY assuring the dignity of the individual and the unity of the Nation ;

IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day of November, 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.

PART I

THE UNION AND ITS TERRITORY

Name and
territory of
the Union.

1. (1) India, that is Bharat, shall be a Union of States.

(2) The States and the territories thereof shall be the States and their territories specified in Parts A, B and C of the First Schedule.

(3) The territory of India shall comprise—

(a) the territories of the States;

(b) the territories specified in Part D of the First Schedule; and

(c) such other territories as may be acquired.

Admission
or estab-
lishment of
new States.

2. Parliament may by law admit into the Union, or establish, new States on such terms and conditions as it thinks fit.

Formation
of new
States and
alteration
of areas,
boundaries
or names
of existing
States.

3. Parliament may by law—

(a) form a new State by separation of territory from any State or by uniting two or more States or parts of States or by uniting any territory to a part of any State;

(b) increase the area of any State;

(c) diminish the area of any State;

(d) alter the boundaries of any State;

(e) alter the name of any State:

Provided that no Bill for the purpose shall be introduced in either House of Parliament except on the recommendation of the President and unless, where the proposal contained in the Bill affects the boundaries of any State or States specified in Part A or Part B of the First Schedule or the name or names of any such State or States, the views of the Legislature of the State or, as the case may be, of each of the States both with respect to the proposal to introduce the Bill and with respect to the provisions thereof have been ascertained by the President.

THE CONSTITUTION OF INDIA

3

Part I.—The Union and its Territory.—Art. 4.

4. (1) Any law referred to in article 2 or article 3 shall contain such provisions for the amendment of the First Schedule and the Fourth Schedule as may be necessary to give effect to the provisions of the law and may also contain such supplemental, incidental and consequential provisions (including provisions as to representation in Parliament and in the Legislature or Legislatures of the State or States affected by such law) as Parliament may deem necessary.

Laws made under articles 2 and 3 to provide for the amendment of the First and the Fourth Schedules and supplemental, incidental and consequential matters.

(2) No such law as aforesaid shall be deemed to be an amendment of this Constitution for the purposes of article 368.

Part III.—Fundamental Rights.—Arts. 15-16.

Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.

15. (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

(2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to—

(a) access to shops, public restaurants, hotels and places of public entertainment; or

(b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.

(3) Nothing in this article shall prevent the State from making any special provision for women and children.

Equality of opportunity in matters of public employment.

16. (1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.

(3) Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office under any State specified in the First Schedule or any local or other authority within its territory, any requirement as to residence within that State prior to such employment or appointment.

(4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

(5) Nothing in this article shall affect the operation of any law which provides that the incumbent

Part III.—Fundamental Rights.—Arts. 16-19.

of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination.

17. "Untouchability" is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of "Untouchability" shall be an offence punishable in accordance with law.

Abolition of Untouchability.

18. (1) No title, not being a military or academic distinction, shall be conferred by the State.

Abolition of titles.

(2) No citizen of India shall accept any title from any foreign State.

(3) No person who is not a citizen of India shall, while he holds any office of profit or trust under the State, accept without the consent of the President any title from any foreign State.

(4) No person holding any office of profit or trust under the State shall, without the consent of the President, accept any present, emolument, or office of any kind from or under any foreign State.

Right to Freedom

19. (1) All citizens shall have the right—

(a) to freedom of speech and expression;

(b) to assemble peaceably and without arms;

(c) to form associations or unions;

(d) to move freely throughout the territory of India;

(e) to reside and settle in any part of the territory of India;

(f) to acquire, hold and dispose of property; and

(g) to practise any profession, or to carry on any occupation, trade or business.

Protection of certain rights regarding freedom of speech, etc.

Part III.—Fundamental Rights.—Art. 19.

(2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to, libel, slander, defamation, contempt of court or any matter which offends against decency or morality or which undermines the security of, or tends to overthrow, the State.

(3) Nothing in sub-clause (b) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of public order, reasonable restrictions on the exercise of the right conferred by the said sub-clause.

(4) Nothing in sub-clause (c) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of public order or morality, reasonable restrictions on the exercise of the right conferred by the said sub-clause.

(5) Nothing in sub-clauses (d), (e) and (f) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub-clauses either in the interests of the general public or for the protection of the interests of any Scheduled Tribe.

(6) Nothing in sub-clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and, in particular, nothing in the said sub-clause shall affect the operation of any existing law in so far as it prescribes or empowers any authority to prescribe, or prevent the State from making any law prescribing or empowering any authority to prescribe, the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business.

Part III.—Fundamental Rights.—Arts. 20-22.

20. (1) No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.

Protection
in respect
of conviction
for
offences.

(2) No person shall be prosecuted and punished for the same offence more than once.

(3) No person accused of any offence shall be compelled to be a witness against himself.

21. No person shall be deprived of his life or personal liberty except according to procedure established by law.

Protection
of life and
personal
liberty.

22. (1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.

Protection
against
arrest and
detention
in certain
cases.

(2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate.

(3) Nothing in clauses (1) and (2) shall apply—

(a) to any person who for the time being is an enemy alien; or

(b) to any person who is arrested or detained under any law providing for preventive detention.

(4) No law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless—

(a) an Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as, Judges of a High Court

Part III.—Fundamental Rights.—Art. 22.

has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention:

Provided that nothing in this sub-clause shall authorise the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub-clause (b) of clause (7); or

(b) such person is detained in accordance with the provisions of any law made by Parliament under sub-clauses (a) and (b) of clause (7).

(5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.

(6) Nothing in clause (5) shall require the authority making any such order as is referred, to in that clause to disclose facts which such authority considers to be against the public interest to disclose.

(7) Parliament may by law prescribe—

(a) the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of sub-clause (a) of clause (4);

(b) the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention; and

(c) the procedure to be followed by an Advisory Board in an inquiry under sub-clause (a) of clause (4).

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*Part III.—Fundamental Rights.—Arts. 23-25.**Right against Exploitation*

23. (1) Traffic in human beings and *begar* and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law.

Prohibition of traffic in human beings and forced labour.

(2) Nothing in this article shall prevent the State from imposing compulsory service for public purposes, and in imposing such service the State shall not make any discrimination on grounds only of religion, race, caste or class or any of them.

24. No child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment.

Prohibition of employment of children in factories, etc.

Right to Freedom of Religion

25. (1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.

Freedom of conscience and free profession, practice and propagation of religion.

(2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law—

(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;

(b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

Explanation I.—The wearing and carrying of *kirpans* shall be deemed to be included in the profession of the Sikh religion.

Explanation II.—In sub-clause (b) of clause (2), the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly.

Part III.—Fundamental Rights.—Arts. 26-29.

Freedom
to manage
religious
affairs.

26. Subject to public order, morality and health, every religious denomination or any section thereof shall have the right—

- (a) to establish and maintain institutions for religious and charitable purposes;
- (b) to manage its own affairs in matters of religion;
- (c) to own and acquire movable and immovable property; and
- (d) to administer such property in accordance with law.

Freedom
as to pay-
ment of
taxes for
promotion
of any
particular
religion.

27. No person shall be compelled to pay any taxes, the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination.

Freedom
as to at-
tend-
ance at
religious
instruc-
tion or
religious
worship in
certain edu-
cational in-
stitutions.

28. (1) No religious instruction shall be provided in any educational institution wholly maintained out of State funds.

(2) Nothing in clause (1) shall apply to an educational institution which is administered by the State but has been established under any endowment or trust which requires that religious instruction shall be imparted in such institution.

(3) No person attending any educational institution recognised by the State or receiving aid out of State funds shall be required to take part in any religious instruction that may be imparted in such institution or to attend any religious worship that may be conducted in such institution or in any premises attached thereto unless such person or, if such person is a minor, his guardian has given his consent thereto.

Cultural and Educational Rights

Protection
of interests
of mino-
rities.

29. (1) Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.

Part III.—Fundamental Rights.—Arts. 29-31.

(2) No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.

30. (1) All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.

Right of minorities to establish and administer educational institutions.

(2) The State shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language.

Right to Property

31. (1) No person shall be deprived of his property save by authority of law.

Compulsory acquisition of property.

(2) No property, movable or immovable, including any interest in, or in any company owning, any commercial or industrial undertaking, shall be taken possession of or acquired for public purposes under any law authorising the taking of such possession or such acquisition, unless the law provides for compensation for the property taken possession of or acquired and either fixes the amount of the compensation, or specifies the principles on which, and the manner in which, the compensation is to be determined and given.

(3) No such law as is referred to in clause (2) made by the Legislature of a State shall have effect unless such law, having been reserved for the consideration of the President, has received his assent.

(4) If any Bill pending at the commencement of this Constitution in the Legislature of a State has, after it has been passed by such Legislature, been reserved for the consideration of the President and has received his assent, then, notwithstanding anything in this Constitution, the law so assented to shall not be called in question in any court on the ground that it contravenes the provisions of clause (2).

Part III.—Fundamental Rights.—Arts. 31-32.

(5) Nothing in clause (2) shall affect—

(a) the provisions of any existing law other than a law to which the provisions of clause (6) apply, or

(b) the provisions of any law which the State may hereafter make—

(i) for the purpose of imposing or levying any tax or penalty, or

(ii) for the promotion of public health or the prevention of danger to life or property, or

(iii) in pursuance of any agreement entered into between the Government of the Dominion of India or the Government of India and the Government of any other country, or otherwise, with respect to property declared by law to be evacuee property.

(6) Any law of the State enacted not more than eighteen months before the commencement of this Constitution may within three months from such commencement be submitted to the President for his certification; and thereupon, if the President by public notification so certifies, it shall not be called in question in any court on the ground that it contravenes the provisions of clause (2) of this article or has contravened the provisions of sub-section (2) of section 299 of the Government of India Act, 1935.

Right to Constitutional Remedies

Remedies
for enforce-
ment of
rights con-
ferred by
this Part.

32. (1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.

(2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.

THE CONSTITUTION OF INDIA 17

Part III.—Fundamental Rights.—Arts. 32-35.

(3) Without prejudice to the powers conferred on the Supreme Court by clauses (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2).

(4) The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution.

33. Parliament may by law determine to what extent any of the rights conferred by this Part shall, in their application to the members of the Armed Forces or the Forces charged with the maintenance of public order, be restricted or abrogated so as to ensure the proper discharge of their duties and the maintenance of discipline among them.

Power to
Parliament
to modify
the rights
conferred
by this
Part
in their
application
to Forces.

34. Notwithstanding anything in the foregoing provisions of this Part, Parliament may by law indemnify any person in the service of the Union or of a State or any other person in respect of any act done by him in connection with the maintenance or restoration of order in any area within the territory of India where martial law was in force or validate any sentence passed, punishment inflicted, forfeiture ordered or other act done under martial law in such area.

Restriction
on rights
conferred
by this
Part while
martial law
is in force
in any area.

35. Notwithstanding anything in this Constitution,—

Legislation
to give
effect to
the provi-
sions of this
Part.

(a) Parliament shall have, and the Legislature of a State shall not have, power to make laws—

(i) with respect to any of the matters which under clause (3) of article 16, clause (3) of article 32, article 33 and article 34 may be provided for by law made by Parliament; and

(ii) for prescribing punishment for those acts which are declared to be offences under this Part;

Part III.—Fundamental Rights.—Art. 35.

and Parliament shall, as soon as may be after the commencement of this Constitution, make laws for prescribing punishment for the acts referred to in sub-clause (ii);

- (b) any law in force immediately before the commencement of this Constitution in the territory of India with respect to any of the matters referred to in sub-clause (i) of clause (a) or providing for punishment for any act referred to in sub-clause (ii) of that clause shall, subject to the terms thereof and to any adaptations and modifications that may be made therein under article 372, continue in force until altered or repealed or amended by Parliament.

Explanation.—In this article, the expression “law in force” has the same meaning as in article 372.

The Constitution of India

as amended by
**The Constitution (One Hundred and First
Amendment) Act, 2016**

along with
SHORT NOTES

Universal
Law Publishing

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11. **Parliament to regulate the right of citizenship by law.**—Nothing in the foregoing provisions of this Part shall derogate from the power of Parliament to make any provision with respect to the acquisition and termination of citizenship and all other matters relating to citizenship.

PART III FUNDAMENTAL RIGHTS

General

12. **Definition.**—In this part, unless the context otherwise requires, “the State” includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India.

COMMENTS

Unaided private schools over which the Government has no administrative control are not “State” within the meaning of article 12; *Salimbla Sharma v. St. Paul's Senior Secondary School*, AIR 2011 SC 2926; JT 2011 (8) SC 611: 2011 (6) SLT 250: 2011 (5) SLR 427.

13. **Laws inconsistent with or in derogation of the fundamental rights.**—

(1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.

(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.

(3) In this article, unless the context otherwise requires,—

(a) “law” includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law;

(b) “laws in force” includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas.

¹[(4) Nothing in this article shall apply to any amendment of this Constitution made under article 368.]

COMMENTS

(i) Article 13(2) clearly prohibits the making of any law by the State which takes away or abridges rights, conferred by Part III of the Constitution. In the event of such a law being made the same shall be void to the extent of contravention; *State of Punjab v. Dalbir Singh*, 2012 AIR (SC) 1040: 2012 (3) SCC 346: 2012 (2) JT 300: 2012 (2) SCALE 126.

(ii) The fundamental rights, enshrined in Part III of the Constitution, are inherent and cannot be extinguished by any constitutional or statutory provision. Any law that abrogates or abridges such rights would be violative of the basic structure doctrine; *State of West Bengal v. Committee for Protection of Democratic Rights, West Bengal*, AIR 2010 SC 1476.

Right to Equality

14. **Equality before law.**—The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

COMMENTS

(i) Concept of equality is a positive concept. Court can command the State to give equal treatment to similarly situated persons but cannot issue a mandate that the State should commit illegality or pass wrong order because in another case such an illegality has been committed or wrong order has been passed. Article 14 cannot be invoked for perpetuating irregularities or illegalities, *Usha Mehta v. Government of Andhra Pradesh*, 2012 (11) JT 154: 2012 (10) SCALE 468: 2012 (8) SLT 101.

(ii) The *vires* of any subordinate legislation can be challenged that it is arbitrary, unreasonable and offends article 14 of the Constitution; *Sudhir Kumar Consul v. Allahabad Bank*, (2011) 3 SCC 486: JT 2011 (2) SC 418: (2011) 2 SCALE 661.

1. Ins. by the Constitution (Twenty-fourth Amendment) Act, 1971, sec. 2 (w.e.f. 5-11-1971).

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(iii) Article 14 would apply only when invidious discrimination is meted out to equals and similarly circumstanced without any rational basis or relationship in that behalf; *Bondu Ramaswamy v. Bangalore Development Authority*, (2010) 7 SCC 129: JT 2010 (6) SC 57: (2010) 5 SCALE 70.

(iv) A person is treated unequally only if that person is treated worse than others, and those others (the comparison group) must be those who are "similarly situated" to the complainant; *Glanrock Estate (P) Ltd. v. State of Tamil Nadu*, (2010) 10 SCC 96: JT 2010 (9) SC 568: (2010) 9 SCALE 270.

15. Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.—(1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

(2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to—

- (a) access to shops, public restaurants, hotels and places of public entertainment; or
- (b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of general public.

(3) Nothing in this article shall prevent the State from making any special provision for women and children.

¹[(4) Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.]

²[(5) Nothing in this article or in sub-clause (g) of clause (1) of article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of article 30.]

COMMENTS

Article 15(4) is only an enabling provision and it is for the respective States either to enact a legislation or issue an executive instruction providing reservation. Article 15(4) is discretionary and no writ can be issued to effect reservation. Such special provision may be made not only by the Legislature but also by the executive; *Dr. Gulshan Prakash v. State of Haryana*, AIR 2010 SC 288.

16. Equality of opportunity in matters of public employment.—(1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.

(3) Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office ³[under the Government of, or any local or other authority within, a State or Union territory, any requirement as to residence within that State or Union territory] prior to such employment or appointment.

(4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

1. Added by the Constitution (First Amendment) Act, 1951, sec. 2 (w.e.f. 18-6-1951).

2. Ins. by the Constitution (Ninety-third Amendment) Act, 2005, sec. 2 (w.e.f. 20-1-2006).

3. Subs. by the Constitution (Seventh Amendment) Act, 1956, sec. 29 and Sch., for certain words (w.e.f. 1-11-1956).

¹[(4A) Nothing in this article shall prevent the State from making any provision for reservation ²[in matters of promotion, with consequential seniority, to any class] or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State.]

³[(4B) Nothing in this article shall prevent the State from considering any unfilled vacancies of a year which are reserved for being filled up in that year in accordance with any provision for reservation made under clause (4) or clause (4A) as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of fifty per cent. reservation on total number of vacancies of that year.]

(5) Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination.

COMMENTS

It is an accepted legal position that the right of eligible employees to be considered for promotion is virtually a part of their fundamental right guaranteed under article 16. The guarantee of a fair consideration in matters of promotion under article 16 virtually flows from guarantee of equality under article 14 of the Constitution; *Union of India v. Hemraj Singh Chauhan*, AIR 2010 SC 1682.

17. Abolition of untouchability.—"Untouchability" is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of "Untouchability" shall be an offence punishable in accordance with law.

18. Abolition of titles.—(1) No title, not being a military or academic distinction, shall be conferred by the State.

(2) No citizen of India shall accept any title from any foreign State.

(3) No person who is not a citizen of India shall, while he holds any office of profit or trust under the State, accept without the consent of the President any title from any foreign State.

(4) No person holding any office of profit or trust under the State shall, without the consent of the President, accept any present, emolument, or office of any kind from or under any foreign State.

Right to Freedom

19. Protection of certain rights regarding freedom of speech, etc.—(1) All citizens shall have the right—

- (a) to freedom of speech and expression;
- (b) to assemble peaceably and without arms;
- (c) to form associations or unions ⁴[or co-operative societies];
- (d) to move freely throughout the territory of India;
- (e) to reside and settle in any part of the territory of India; ⁵[and]

1. Ins. by the Constitution (Seventy-seventh Amendment) Act, 1995, sec. 2 (w.e.f. 17-6-1995).
2. Subs. by the Constitution (Eighty-fifth Amendment) Act, 2001, sec. 2, for "in matters of promotion to any class" (w.r.e.f. 17-6-1995).
3. Ins. by the Constitution (Eighty-first Amendment) Act, 2000, sec. 2 (w.e.f. 9-6-2000).
4. Ins. by the Constitution (Ninety-seventh Amendment) Act, 2011, sec. 2 (w.e.f. 15-2-2012).
5. Ins. by the Constitution (Forty-fourth Amendment) Act, 1978, sec. 2(a)(i) (w.e.f. 20-6-1979).

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(g) to practise any profession, or to carry on any occupation, trade or business.

²[(2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of ³[the sovereignty and integrity of India,] the security of the State, friendly relations with Foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence.]

(3) Nothing in sub-clause (b) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of ⁴[the sovereignty and integrity of India or] public order, reasonable restrictions on the exercise of the right conferred by the said sub-clause.

(4) Nothing in sub-clause (c) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of ⁴[the sovereignty and integrity of India or] public order or morality, reasonable restrictions on the exercise of the right conferred by the said sub-clause.

(5) Nothing in ⁵[sub-clauses (d) and (e)] of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub-clauses either in the interests of the general public or for the protection of the interests of any Scheduled Tribe.

(6) Nothing in sub-clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and, in particular, ⁶[nothing in the said sub-clause shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to,—

- (i) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or
- (ii) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise].

COMMENTS

A company cannot maintain a petition under article 32 for enforcement of fundamental rights guaranteed under article 19. Company not being a citizen has no fundamental rights; *Shree Sidhali Steels Ltd. v. State of Uttar Pradesh*, AIR 2011 SC 1175: (2011) 3 SCC 193: (2011) 1 SCALE 676.

COMMENTS

Freedom of speech – Restriction

Duty of media to provide correct information. It is the responsibility of the media to ensure that they are not providing the public with information that is factually wrong biased on simply unverified information. The right to freedom of speech is enshrined in article 19(1)(a) of the Constitution. However, this right is restricted by article 19(2) in the

1. Sub-clause (f) omitted by the Constitution (Forty-fourth Amendment) Act, 1978, sec. 2(a)(ii) (w.e.f. 20-6-1979).
2. Subs. by the Constitution (First Amendment) Act, 1951, sec. 3(a), for clause (2) (with retrospective effect).
3. Ins. by the Constitution (Sixteenth Amendment) Act, 1963, sec. 2(a) (w.e.f. 5-10-1963).
4. Ins. by the Constitution (Sixteenth Amendment) Act, 1963, sec. 2(b) (w.e.f. 5-10-1963).
5. Subs. by the Constitution (Forty-fourth Amendment) Act, 1978, sec. 2(b), for "sub-clauses (d), (e) and (f)" (w.e.f. 20-6-1979).
6. Subs. by the Constitution (First Amendment) Act, 1951, sec. 3(b), for certain words (w.e.f. 18-6-1951).

interest of the sovereignty and integrity of India, security of the State, Public order, decency and morality and also Contempt of Courts Act and defamation; *Sanjay Narayan, Editor-in-Chief Hindustan v. Hon. High Court of Allahabad*, JT 2011 (10) SC 74: (2011) 9 SCALE 532.

Scope

This *vires* of any subordinate legislation can be challenged on the ground that it is arbitrary, unreasonable and offends article 14 of the Constitution; *Sudhir Kumar Consul v. Allahabad Bank*, (2011) (3) SCC 486: JT 2011 (2) SC 418: 2011 (2) LLJ 199: 2011 (2) SLT 312.

20. Protection in respect of conviction for offences.—(1) No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.

(2) No person shall be prosecuted and punished for the same offence more than once.

(3) No person accused of any offence shall be compelled to be a witness against himself.

COMMENTS

(i) Right against self-incrimination under article 20(3) does not exclude any voluntary statements made in exercise of free will and volition; *Mohammed Ajmal Mohammad Amir Kasab v. State of Maharashtra*, 2012 AIR (SC) 3565: 2012 (9) SCC 1: 2012 (8) JT 4: 2012 (7) SCALE 553.

(ii) Protection under article 20(3) does not extend to any kind of evidence but only to self-incriminating statements relating to the charges brought against an accused. In order to bring the testimony of an accused within the prohibition of constitutional protection, it must be of such character that by itself it tends to incriminate the accused. For invoking the constitutional rights under article 20(3) a formal accusation against the person claiming the protection must exist; *Balasaheb v. State of Maharashtra*, AIR 2011 SC 304: (2011) 1 SCC 364: JT 2010 (13) SC 744: (2010) 13 SCALE 180.

(iii) It is trite law that the sentence impossible on the date of commission of the offence has to determine the sentence impossible on completion of trial. This proposition is clear even on a bare reading of article 20(1). Under article 20(1) what is prohibited is the conviction and sentence in criminal proceedings under *ex post facto* law; *Ravinder Singh v. State of Himachal Pradesh*, AIR 2010 SC 199.

21. Protection of life and personal liberty.—No person shall be deprived of his life or personal liberty except according to procedure established by law.

COMMENTS

(i) When the undertrial prisoners are detained in jail custody to an indefinite period, article 21 of the Constitution is violated; *Dipak Shubashchandra Mehta v. Central Bureau of Investigation*, 2012 AIR (SC) 949: 2012 (4) SCC 134: 2012 (2) JT 439: 2012 (2) SCALE 401.

(ii) Right to privacy is an integral part of life. This is a cherished constitutional value, and it is important that human beings be allowed domains of freedom that are free of public scrutiny unless they act in an unlawful manner; *Ram Jethmalani v. Union of India*, (2011) 8 SCC 1: JT 2011 (7) SC 104: (2011) 6 SCALE 691.

(iii) Right to life is one of the basic human right and not even the State has the authority to violate that right; *Siddharam Satlingappa Mhetre v. State of Maharashtra*, JT 2010 (13) SC 247: (2010) 12 SCALE 691.

(iv) The woman's right to make reproductive choices is also a dimension of "personal liberty" as understood under article 21. It is important to recognise that reproductive choices can be exercised to procreate as well as to abstain from procreating. The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected. This means that there should be no restriction whatsoever on the exercise of reproduction choices such as a woman's right to refuse participation in sexual activity or alternatively the insistence on use of contraceptive methods. Furthermore, women are also free to choose birth control methods such as undergoing sterilisation procedures. Taken to their logical conclusion, reproductive rights include a woman's entitlement to carry a pregnancy to its full term, to give birth and to subsequently raise children. However, in the case of pregnant women there is also a 'compelling State interest' in protecting the life of the prospective child; *Suchita Srivastava v. Chandigarh Administration*, AIR 2010 SC 235.

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(v) Assurance of a fair trial is the first imperative of the dispensation of justice; *Police Commr., Delhi v. Registrar Delhi High Court*, AIR 1997 SC 95.

(vi) Right to livelihood is an integral facet of the right to life; *Narendra Kumar v. State of Haryana*, JT (1994) 2 SC 94.

COMMENTS

Inter-caste marriages

A boy and a girl married on their own will. They were majors and the marriage was duly registered under the notified authority. The police officials have no role in their conjugal affairs and the law enforcing authorities have no right to interfere with their married life and, in fact, they are duty bound to prevent others who interfere in their married life; *Ashok Kumar Tooi v. Kishwar Jahan*, AIR 2011 SC 1254: (2011) 3 SCC 758: JT 2011 (3) SC 50: (2011) 3 SCALE 94: 2011 Cr LJ 2317.

Life – meaning thereof

The word life in article 21 means a life of dignity and not just an animal life; *Budhadev Karmaskar v. State of West Bengal*, AIR 2011 SC 2636: (2011) (10) SCC 277: JT 2011 (8) SC 289: (2011) 8 SCALE 155.

Livelihood

Clause 4 of Bye-laws framed by Cine Costume, Make-up Artists and Hair Dressers Association, a registered Trade Union, restricting membership of association only to men (Make-up men, costume men and hair dressers) violates section 21 of the Trade Unions Act, 1926, for the Act has not made any distinction between men and women. Had it made a bold distinction it would have been indubitably unconstitutional. The Legislature, by way of amendment in section 21A of the 1926 Act, has only fixed the age. The clause, apart from violating the statutory command, also violates the constitutional mandate which postulates that there cannot be any discrimination on ground of sex. Such discrimination in the access of employment and to be considered for the employment unless some justifiable riders are attached to it, cannot withstand scrutiny. When the access or entry is denied, article 21 which deals with livelihood is offended. It also works against the fundamental human rights. Such kind of debarment creates a concavity in her capacity to earn her livelihood; *Charu Khurana v. Union of India*, AIR 2015 SC 839.

¹[21A. Right to education.—The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine.]

COMMENTS

(i) In order to ensure compliance of article 21A of the Constitution, it is imperative that schools must have qualified teachers and basic infrastructure; *Environmental and Consumer Protect Foundation v. Delhi Administration*, 2012 (4) SCALE 243.

(ii) Right of a child should not be restricted only to free and compulsory education, but should be extended to have quality education without any discrimination on the ground of their economic, social and cultural background; *State of Tamil Nadu v. K. Shyam Sunder*, AIR 2011 SC 3470: (2011) 8 SCC 737: JT 2011 (9) SC 166: (2011) 8 SCALE 474.

²22. Protection against arrest and detention in certain cases.—(1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.

(2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no person shall be detained in custody beyond the said period without the authority of a magistrate.

(3) Nothing in clauses (1) and (2) shall apply—

- (a) to any person who for the time being is an enemy alien; or
- (b) to any person who is arrested or detained under any law providing for preventive detention.

(4) No law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless—

1. Ins. by the Constitution (Eighty-sixth Amendment) Act, 2002, sec. 2 (w.e.f. 1-4-2010).
2. On the enforcement of section 3 of the Constitution (Forty-fourth Amendment) Act, 1978, article 22 shall stand amended as directed in section 3 of that Act. (Ed.—So far no date has been notified for the enforcement of section 3).

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Article

- (a) an Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as, Judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention:

Provided that nothing in this sub-clause shall authorise the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub-clause (b) of clause (7); or

- (b) such person is detained in accordance with the provisions of any law made by Parliament under sub-clauses (a) and (b) of clause (7).

(5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.

(6) Nothing in clause (5) shall require the authority making any such order as is referred to in that clause to disclose facts which such authority considers to be against the public interest to disclose.

(7) Parliament may by law prescribe—

- (a) the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of sub-clause (a) of clause (4);

- (b) the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention; and

- (c) the procedure to be followed by an Advisory Board in an inquiry under sub-clause (a) of clause (4).

COMMENTS

The right under article 22(2) is available only against illegal detention by police. It is not available against custody in jail of a person pursuant to a judicial order as article 22(2) does not operate against the judicial order; *Sadhvi Pragyna Singh Thakur v. State of Maharashtra*, JT 2011 (12) SC 56: (2011) 10 SCALE 771.

Right against Exploitation

23. Prohibition of traffic in human beings and forced labour.—(1) Traffic in human beings and begar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law.

(2) Nothing in this article shall prevent the State from imposing compulsory service for public purposes, and in imposing such service the State shall not make any discrimination on grounds only of religion, race, caste or class or any of them.

24. Prohibition of employment of children in factories, etc.—No child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment.

Right to Freedom of Religion

25. Freedom of conscience and free profession, practice and propagation of religion.—(1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.

(2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law—

- (a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;
- (b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

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Explanation I.—The wearing and carrying of kirpans shall be deemed to be included in the profession of the Sikh religion.

Explanation II.—In sub-clause (b) of clause (2), the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly.

26. Freedom to manage religious affairs.—Subject to public order, morality and health, every religious denomination or any section thereof shall have the right—

- (a) to establish and maintain institutions for religious and charitable purposes;
- (b) to manage its own affairs in matters of religion;
- (c) to own and acquire movable and immovable property; and
- (d) to administer such property in accordance with law.

COMMENTS

Religious Rights

The object and purpose of enacting article 26 is to protect the rights conferred therein on a 'religious denomination' or a section thereof. However, the rights conferred under article 26 are subject to public order, morality and health and not subject to any other provision of Part III of the Constitution as the limitation has been prescribed by the law makers by virtue of article 25 of the Constitution; *Dr. Subramanian Swamy v. State of Tamil Nadu*, AIR 2015 SC 460.

27. Freedom as to payment of taxes for promotion of any particular religion.—No person shall be compelled to pay any taxes, the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination.

28. Freedom as to attendance at religious instruction or religious worship in certain educational institutions.—(1) No religious instruction shall be provided in any educational institution wholly maintained out of State funds.

(2) Nothing in clause (1) shall apply to an educational institution which is administered by the State but has been established under any endowment or trust which requires that religious instruction shall be imparted in such institution.

(3) No person attending any educational institution recognised by the State or receiving aid out of State funds shall be required to take part in any religious instruction that may be imparted in such institution or to attend any religious worship that may be conducted in such institution or in any premises attached thereto unless such person or, if such person is a minor, his guardian has given his consent thereto.

Cultural and Educational Rights

29. Protection of interests of minorities.—(1) Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.

(2) No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.

30. Right of minorities to establish and administer educational institutions.—(1) All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.

¹[(1A) In making any law providing for the compulsory acquisition of any property of an educational institution established and administered by a minority, referred to in clause (1), the State shall ensure that the amount fixed by or determined under such law for the acquisition of such property is such as would not restrict or abrogate the right guaranteed under that clause.]

1. Ins. by the Constitution (Forty-fourth Amendment) Act, 1978, sec. 4 (w.e.f. 20-6-1979).

(2) The State shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language.

COMMENTS

The rights conferred by article 30 of the Constitution to the minority are in two parts. The first part is the right to establish the institution of minority's choice and the second part relates to the right to administration of such institution. The word establishment herein means bringing into being of an institution and it must be by minority community. The administration means management of the affairs of the institution. Thus in order to claim minority/linguistic status for an institution in any State, the authorities must be satisfied *firstly* that the institution has been established by the persons who are minority in such State; and *secondly*, the right of administration of the said minority/linguistic institution is also vested in those persons who are minority in such State. The right conferred by article 30 cannot be interpreted as if irrespective of the persons who established the institution in the State for the benefit of persons who are minority, any person, be it non-minority in other place, can administer and run such institution; *Dayanand Anglo Vedic DAV College Trust and Management Society v. State of Maharashtra*, AIR 2013 SC 1420.

¹[***]

²[31. **Compulsory acquisition of property.**—[Rep. by the Constitution (Forty-fourth Amendment) Act, 1978, sec. 6 (w.e.f. 20-6-1979).]]

³[*Saving of Certain Laws*]

⁴[31A. **Saving of laws providing for acquisition of estates, etc.**—

⁵[(1) Notwithstanding anything contained in article 13, no law providing for—

- (a) the acquisition by the State of any estate or of any rights therein or the extinguishment or modification of any such rights, or
- (b) the taking over of the management of any property by the State for a limited period either in the public interest or in order to secure the proper management of the property, or
- (c) the amalgamation of two or more corporations either in the public interest or in order to secure the proper management of any of the corporations, or
- (d) the extinguishment or modification of any rights of managing agents, secretaries and treasurers, managing directors, directors or managers of corporations, or of any voting rights of shareholders thereof, or
- (e) the extinguishment or modification of any rights accruing by virtue of any agreement, lease or licence for the purpose of searching for, or winning, any mineral or mineral oil, or the premature termination or cancellation of any such agreement, lease or licence,

shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by ⁶[article 14 or article 19]:

Provided that where such law is a law made by the Legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent:]

⁷[Provided further that where any law makes any provision for the acquisition by the State of any estate and where any land comprised therein is held by a

1. The sub-heading "*Right to Property*" omitted by the Constitution (Forty-fourth Amendment) Act, 1978, sec. 5 (w.e.f. 20-6-1979).
2. Article 31 was earlier amended by the Constitution (Fourth Amendment) Act, 1955, sec. 2 (w.e.f. 27-4-1955) and by the Constitution (Twenty-fifth Amendment) Act, 1971, sec. 2 (w.e.f. 20-4-1972).
3. Ins. by the Constitution (Forty-second Amendment) Act, 1976, sec. 3 (w.e.f. 3-1-1977).
4. Ins. by the Constitution (First Amendment) Act, 1951, sec. 4 (with retrospective effect).
5. Subs. by the Constitution (Fourth Amendment) Act, 1955, sec. 3(a), for clause (1) (with retrospective effect).
6. Subs. by the Constitution (Forty-fourth Amendment) Act, 1978, sec. 7, for "article 14, article 19 or article 31" (w.e.f. 20-6-1979).
7. Ins. by the Constitution (Seventeenth Amendment) Act, 1964, sec. 2(i) (w.e.f. 20-6-1964).

person under his personal cultivation, it shall not be lawful for the State to acquire any portion of such land as is within the ceiling limit applicable to him under any law for the time being in force or any building or structure standing thereon or appurtenant thereto, unless the law relating to the acquisition of such land, building or structure, provides for payment of compensation at a rate which shall not be less than the market value thereof.]

(2) In this article,—

¹[(a) the expression “estate” shall, in relation to any local area, have the same meaning as that expression or its local equivalent has in the existing law relating to land tenures in force in that area and shall also include—

- (i) any *jagir*, *inam* or *muafi* or other similar grant and in the States of ²[Tamil Nadu] and Kerala, any *janmam* right;
- (ii) any land held under *ryotwari* settlement;
- (iii) any land held or let for purposes of agriculture or for purposes ancillary thereto, including waste land, forest land, land for pasture or sites of buildings and other structures occupied by cultivators of land, agricultural labourers and village artisans;]

(b) the expression “rights”, in relation to an estate, shall include any rights vesting in a proprietor, sub-proprietor, under-proprietor, tenure-holder, ³[*raiyat*, under-*raiyat*] or other intermediary and any rights or privileges in respect of land revenue.]

⁴[31B. Validation of certain Acts and Regulations.—Without prejudice to the generality of the provisions contained in article 31A, none of the Acts and Regulations specified in the Ninth Schedule nor any of the provision thereof shall be deemed to be void, or ever to have become void, on the ground that such Act, Regulation or provision is inconsistent with, or takes away or abridges any of the rights conferred by, any provisions of this Part, and notwithstanding any judgment, decree or order of any court or tribunal to the contrary, each of the said Acts and Regulations shall, subject to the power of any competent Legislature to repeal or amend it, continue in force.]

⁵[31C. Saving of laws giving effect to certain directive principles.—Notwithstanding anything contained in article 13, no law giving effect to the policy of the State towards securing ⁶[all or any of the principles laid down in Part IV] shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by ⁷[article 14 or article 19] ⁸[and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy]:

1. Subs. by the Constitution (Seventeenth Amendment) Act, 1964, sec. 2(ii), for sub-clause (a) (with retrospective effect). Earlier clause (a) was amended by the Constitution (Fourth Amendment) Act, 1955, sec. 3(b)(i) (with retrospective effect) and by the Constitution (Seventh Amendment) Act, 1956, sec. 29 and Sch. (w.e.f. 1-11-1956).
2. Subs. by the Madras State (Alteration of Name) Act, 1968 (53 of 1968), sec. 4, for “Madras” (w.e.f. 14-1-1969).
3. Ins. by the Constitution (Fourth Amendment) Act, 1955, sec. 3(b)(ii) (with retrospective effect).
4. Ins. by the Constitution (First Amendment) Act, 1951, sec. 5 (w.e.f. 18-6-1951).
5. Ins. by the Constitution (Twenty-fifth Amendment) Act, 1971, sec. 3 (w.e.f. 20-4-1972).
6. Subs. by the Constitution (Forty-second Amendment) Act, 1976, sec. 4, for “the principles specified in clause (b) or clause (c) of article 39” (w.e.f. 3-1-1977). Section 4 has been declared invalid by the Supreme Court in *Minerva Mills Ltd. v. Union of India*, (1980) 2 SCC 591.
7. Subs. by the Constitution (Forty-fourth Amendment) Act, 1978, sec. 8, for “article 14, article 19 or article 31” (w.e.f. 20-6-1979).
8. In *Keshavananda Bharati v. The State of Kerala*, 1973 Supp SCR 1: (1973) 4 SCC 225: AIR 1973 SC 1461, the Supreme Court held the provision in italics to be invalid.

Provided that where such law is made by the Legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent.]

¹[31D. Saving of laws in respect of anti-national activities.—[Rep. by the Constitution (Forty-third Amendment) Act, 1977, section 2 (w.e.f. 13-4-1978).]]

Right to Constitutional Remedies

32. Remedies for enforcement of rights conferred by this Part.—(1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.

(2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.

(3) Without prejudice to the powers conferred on the Supreme Court by clauses (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2).

(4) The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution.

COMMENTS

(i) Article 32 which has been described as the "heart and soul" of the Constitution guarantees the right to move the Supreme Court for the enforcement of all or any of the fundamental rights conferred by Part III of the Constitution. This article is, therefore, itself a fundamental right; *Assam Sanmilita Mahasangha v. Union of India*, AIR 2015 SC 783.

(ii) A company cannot maintain a petition under article 32 for enforcement of fundamental rights guaranteed under article 19. Company not being a citizen has no fundamental rights; *Shree Sidhballi Steels Ltd. v. State of Uttar Pradesh*, AIR 2011 SC 1175: (2011) 3 SCC 193: (2011) 1 SCALE 676.

(iii) Citizens are entitled to appropriate relief under the provisions of Article 32, provided it is shown to the satisfaction of the court that the Fundamental Rights of petitioner had been violated; *Poonam v. Sumit Tanwar*, AIR 2010 SC 1384: (2010) 4 SCC 460: JT 2010 (3) SC 259.

(iv) Except for a writ of *quo warranto*, PIL is not maintainable in service matters. For issuance of writ of *quo warranto* the High Court has to satisfy that the appointment is contrary to the statutory rules. Suitability or otherwise of a candidate for appointment to a post in Government service is the function of the appointing authority and not of the court unless the appointment is contrary to statutory provisions/rules; *Hari Bansh Lal v. Sahodar Prasad Mahito*, AIR 2010 SC 3515.

(v) The remedies evolved by way of writ jurisdiction are of an extraordinary nature. They cannot be granted as a matter of due course to provide redressal in situations where statutory remedies are available; *Kunga Nima Lepcha v. State of Sikkim*, AIR 2010 SC 1671.

(vi) Judicial review under articles 32 and 226 is a basic feature of the Constitution beyond the pale of amendability; *Kihota v. Zachilhu*, AIR 1993 SC 412.

Writ of *quo warranto*

Before a citizen can claim a writ of *quo warranto* he must satisfy the court *inter alia* that the office in question is a public office and it is held by a person without legal authority and that leads to the enquiry as to whether the appointment of the said person has been in accordance with law or not; *Centre for PIL v. Union of India*, AIR 2011 SC 1267: (2011) 4 SCC 1: JT 2011 (2) SC 613: (2011) 3 SCALE 148.

Public Interest Litigation

A petition which lacks *bona fides* and is intended to settle business rivalry or is aimed at taking over a company or augmenting the business of another interested company at the cost of closing business of office units in the garb of Public Interest Litigation would be nothing but abuse of the process of law; *Kalyaneshwari v. Union of India*, (2011) 3 SCC 287: JT 2011 (2) SC 38: (2011) 1 SCALE 651.

1. Article 31D was earlier inserted by the Constitution (Forty-second Amendment) Act, 1976, sec. 5 (w.e.f. 3-1-1977).

¹[32A. Constitutional validity of State laws not to be considered in proceedings under article 32.—[Rep. by the Constitution (Forty-third Amendment) Act, 1977, sec. 3 (w.e.f. 13-4-1978).]]

²[33. Power of Parliament to modify the rights conferred by this Part in their application to Forces, etc.—Parliament may, by law, determine to what extent any of the rights conferred by this Part shall, in their application to,—

- (a) the members of the Armed Forces; or
- (b) the members of the Forces charged with the maintenance of public order; or
- (c) persons employed in any bureau or other organisation established by the State for purposes of intelligence or counter intelligence; or
- (d) persons employed in, or in connection with, the telecommunication systems set up for the purposes of any Force, bureau or organisation referred to in clauses (a) to (c),

be restricted or abrogated so as to ensure the proper discharge of their duties and the maintenance of discipline among them.]

34. Restriction on rights conferred by this Part while martial law is in force in any area.—Notwithstanding anything in the foregoing provisions of this Part, Parliament may by law indemnify any person in the service of the Union or of a State or any other person in respect of any act done by him in connection with the maintenance or restoration of order in any area within the territory of India where martial law was in force or validate any sentence passed, punishment inflicted, forfeiture ordered or other act done under martial law in such area.

35. Legislation to give effect to the provisions of this Part.—Notwithstanding anything in this Constitution,—

- (a) Parliament shall have, and the Legislature of a State shall not have, power to make laws—
 - (i) with respect to any of the matters which under clause (3) of article 16, clause (3) of article 32, article 33 and article 34 may be provided for by law made by Parliament; and
 - (ii) for prescribing punishment for those acts which are declared to be offences under this Part,
 and Parliament shall, as soon as may be after the commencement of this Constitution, make laws for prescribing punishment for the acts referred to in sub-clause (ii);
- (b) any law in force immediately before the commencement of this Constitution in the territory of India with respect to any of the matters referred to in sub-clause (i) of clause (a) or providing for punishment for any act referred to in sub-clause (ii) of that clause shall, subject to the terms thereof and to any adaptations and modifications that may be made therein under article 372, continue in force until altered or repealed or amended by Parliament.

Explanation.—In this article, the expression “law in force” has the same meaning as in article 372.

PART IV DIRECTIVE PRINCIPLES OF STATE POLICY

36. Definition.—In this Part, unless the context otherwise requires, “the State” has the same meaning as in Part III.

37. Application of the principles contained in this Part.—The provisions contained in this Part shall not be enforceable by any court, but the principles

1. Article 32A was earlier inserted by the Constitution (Forty-second Amendment) Act, 1976, sec. 6 (w.e.f. 1-2-1977).

2. Subs. by the Constitution (Fiftieth Amendment) Act, 1984, sec. 2, for article 33 (w.e.f. 11-9-1984).

Evolution and Expansion of Part III-Rights

1. *A.K. Gopalan v. State of Madras*, 1950 SCR 88- 6-Judges,

Per Kania, CJ., at p. 105

"Reading Article 19 in that way it appears to me that the concept of the right to move freely throughout the territory of India is an entirely different concept from the right to "personal liberty" contemplated by Article 21. "Personal liberty" covers many more rights in one sense and has a restricted meaning in another sense. For instance, while the right to move or reside may be covered by the expression, "personal liberty" the right to freedom of speech (mentioned in Article 19(1)(a)) or the right to acquire, hold or dispose of property (mentioned in 19(1)(f)) cannot be considered a part of the personal liberty of a citizen. They form part of the liberty of a citizen but the limitation imposed by the word "personal" leads me to believe that those rights are not covered by the expression personal liberty. So read there is no conflict between Articles 19 and 21. The contents and subject-matters of Articles 19 and 21 are thus not the same and they proceed to deal with the rights covered by their respective words from totally different angles. As already mentioned in respect of each of the rights specified in sub-clauses of Article 19(1) specific limitations in respect of each is provided, while the expression "personal liberty" in Article 21 is generally controlled by the general expression "procedure established by law". The Constitution, in Article 19, and also in other articles in Part III, thus attempts to strike a balance between individual liberty and the general interest of the society. The restraints provided by the Constitution on the legislative powers or the executive authority of the State thus operate as guarantees of life and personal liberty of the individuals."

At p. 111

"No extrinsic aid is needed to interpret the words of Article 21, which in my opinion, are not ambiguous. Normally read, and without thinking of other Constitutions, the expression "procedure established by law" must mean procedure prescribed by the law of the State. If the Indian Constitution wanted to preserve to every person the protection given by the due process clause of the American Constitution there was nothing to prevent the Assembly from adopting the phrase, or

if they wanted to limit the same to procedure only, to adopt that expression with only the word "procedural" prefixed to "law". However, the correct question is what is the right given by Article 21? The only right is that no person shall be deprived of his life or liberty except according to procedure established by law. One may like that right to cover a larger area, but to give such a right is not the function of the Court; it is the function of the Constitution...."

2. *Satwant Singh Sawhney v. D. Ramarathnam*, (1967) 3 SCR 525- 5 Judges

Per Hidayathullah J. (for himself and R.S. Bachawat, J.)- concurring view

"...Subba Rao J. (as he then was) read personal liberty as the antithesis of physical restraint or coercion and found that Articles 19(1) and 21 overlapped and Article 19(1)(d) was not carved out of personal liberty in Article 21. According to him, personal liberty could be curtailed by law, but that law must satisfy the test in Article 19(2) in so far as the specific rights in Article 19(1)(3) are concerned. In other words, the State must satisfy that both the fundamental rights are not infringed by showing that there is a law and that it does not amount to an unreasonable restriction within the meaning of Article 19(2) of the Constitution. As in that case there was no law, fundamental rights, both under Article 19(1)(d) and Article 21 were held to be infringed. The learned Chief Justice has read into the decision of the Court a meaning which it does not intend to convey. He excludes from Article 21 the right to free motion and locomotion within the territories of India and puts the right to travel abroad in Article 21. He wants to see a law and if his earlier reasoning were to prevail, the law should stand the test of Article 19(2). But since clause (2) deals with matters in Article 19(1) already held excluded, it is obvious that it will not apply. The law which is made can only be tested on the ground of articles other than Article 19 such as Articles 14, 20 and 22 which alone bears upon this matter. In other words, the majority decision of the Court in this case has rejected Ayyangar J.'s view and accepted the view of the minority in *Kharak Singh* case. A similar reasoning had previously prevailed with the Chief Justice in the case of *Kavalappara Kottarathil Kochuni v. State of Madras* [(1960)

3 SCR 887] , but there Article 19 was held not excluded by Article 31 after the latter ceased to be a self-contained article by reason of the fourth amendment and the addition of clause 2-A and the amendment of clause (2). The same exercise in the reverse direction i.e., extending protection to property beyond what is stated in Article 31 by calling in aid something extra from Article 19 was attempted. According to the learned Chief Justice there is an absolute right of property [Art. 19(1)(f)] curtailed to some extent by clause (5) and Article 31. The same reasoning is adopted here. There is an absolute right of locomotion in Article 21 of which one aspect alone is said to be covered by Article 19(1)(d). This view obviously clashes with the reading of Article 21 in Kharak Singh case, because there the right of motion and locomotion was held to be excluded from Article 21. In other words, the present decision advances the minority, view in Kharak Singh case above the majority view stated in that case."

3. *Rustom Cavasjee Cooper v. Union of India*, (1970) 1 SCC 248- 11-Judges

As per J.C. Shah, J. (On behalf of himself, Sikri, Shelab, Bhargawa, Mitter, Vaidialingam, Hegde, Grover, Jagmohan Reddy and Dua, JJ.)

45. Early in the history of this Court the question of inter-relation between the diverse provisions affording the guarantee of fundamental rights in Part III fell to be determined. In *A.K. Gopalan v. State of Madras* [(1950) SCR 88] a person detained pursuant to an order made in exercise of the power conferred by the Preventive Detention Act, 4 of 1950 applied to this Court for a writ of habeas corpus claiming that the Act contravened the guarantee under Articles 19, 21 and 22 of the Constitution. The majority of the Court (Kania, C.J., and Patanjali Sastri, Mahajan, Mukherjea and Das, JJ.), held that Article 22 being a complete code relating to preventive detention, the validity of an order of detention must be determined strictly according to the terms and "within the four corners of that Article". They held that a person detained may not claim that the freedom guaranteed under Article 19(1)(d) was infringed by his detention, and that validity of the law providing for making

orders of detention will not be tested in the light of the reasonableness of the restrictions imposed thereby on the freedom of movement, nor on the ground that his right to personal liberty is infringed otherwise than acceding to the procedure established by law. Fazl Ali, J., expressed a contrary view. This case has formed the nucleus of the theory that the protection of the guarantee of a fundamental freedom must be adjudged in the light of the object of State action in relation to the individual's right and not upon its influence upon the guarantee of the fundamental freedom, and as a corollary thereto, that the freedoms under Articles 19, 21, 22 and 31 are exclusive — each article enacting a code relating to protection of distinct rights.

...
52. In dealing with the argument that Article 31(2) is a complete code relating to infringement of the right to property by compulsory acquisition, and the validity of the law is not liable to be tested in the light of the reasonableness of the restrictions imposed thereby, it is necessary to bear in mind the enunciation of the guarantee of fundamental rights which has taken different forms. In some cases it is an express declaration of a guaranteed right: Articles 29(1), 30(1), 26, 25 and 32; in others to ensure protection of individual rights they take specific forms of restrictions on State action — legislative or executive — Articles 14, 15, 16, 20, 21, 22(1), 27 and 28; in some others, it takes the form of a positive declaration and simultaneously enunciates the restriction thereon: Articles 19(1) and 19(2) to (6); in some cases, it arises as an implication from the delimitation of the authority of the State, e.g. Articles 31(1) and 31(2); in still others, it takes the form of a general prohibition against the State as well as others: Articles 17, 23 and 24. The enunciation of rights either express or by implication does not follow a uniform pattern. But one thread runs through them: they seek to protect the rights of the individual or groups of individuals against infringement of those rights within specific limits. Part III of the Constitution weaves a pattern of guarantees on the texture of basic human rights. The guarantees delimit the protection of those rights in their

allotted fields: they do not attempt to enunciate distinct rights.

4. *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248- 7 Judges

Per P.N. Bhagwati, J. (for himself, Untwalia and Fazal Ali, JJ.)

*It is obvious that Article 21, though couched in negative language, confers the fundamental right to life and personal liberty. So far as the right to personal liberty is concerned, it is ensured by providing that no one shall be deprived of personal liberty except according to procedure prescribed by law. The first question that arises for consideration on the language of Article 21 is: what is the meaning and content of the words "personal liberty" as used in this article? This question incidentally came up for discussion in some of the judgments in *A.K. Gopalan v. State of Madras* [AIR 1950 SC 27: 1950 SCR 88: 51 Cri LJ 1383] and the observations made by Patanjali Sastri, J., Mukherjea, J., and S.R. Das, J., seemed to place a narrow interpretation on the words "personal liberty" so as to confine the protection of Article 21 to freedom of the person against unlawful detention. But there was no definite pronouncement made on this point since the question before the Court was not so much the interpretation of the words "personal liberty" as the inter-relation between Articles 19 and 21. It was in *Kharak Singh v. State of U.P.* [AIR 1963 SC 1295: (1964) 1 SCR 332: (1963) 2 Cri LJ 329] that the question as to the proper scope and meaning of the expression "personal liberty" came up pointedly for consideration for the first time before this Court. The majority of the Judges took the view "that "personal liberty" is used in the article as a compendious term to include within itself all the varieties of rights which go to make up the "personal liberties" of man other than those dealt with in the several clauses of Article 19(1). In other words, while Article 19(1) deals with particular species or attributes of that freedom, 'personal liberty' in Article 21 takes in and comprises the residue. The minority Judges, however, disagreed with this view taken by the majority and explained their position in the following words: "No doubt the expression 'personal liberty' is a comprehensive one and the right to move freely is an attribute of personal liberty. It is said that the freedom*

to move freely is carved out of personal liberty and, therefore, the expression 'personal liberty' in Article 21 excludes that attribute. In our view, this is not a correct approach. Both are independent fundamental rights, though there is overlapping. There is no question of one being carved out of another. The fundamental right of life and personal liberty has many attributes and some of them are found in Article 19. If a person's fundamental right under Article 21 is infringed, the State can rely upon a law to sustain the action, but that cannot be a complete answer unless the said law satisfies the test laid down in Article 19(2) so far as the attributes covered by Article 19(1) are concerned." There can be no doubt that in view of the decision of this Court in R.C. Cooper v. Union of India [(1970) 2 SCC 298 : (1971) 1 SCR 512] the minority view must be regarded as correct and the majority view must be held to have been overruled. We shall have occasion to analyse and discuss the decision in R.C. Cooper case [(1970) 2 SCC 298 : (1971) 1 SCR 512] a little later when we deal with the arguments based on infraction of Articles 19(1)(a) and 19(1)(g), but it is sufficient to state for the present that according to this decision, which was a decision given by the Full Court, the fundamental rights conferred by Part III are not distinct and mutually exclusive rights. Each freedom has different dimensions and merely because the limits of interference with one freedom are satisfied, the law is not freed from the necessity to meet the challenge of another guaranteed freedom. The decision in A.K. Gopalan case [AIR 1950 SC 27 : 1950 SCR 88 : 51 Cri LJ 1383] gave rise to the theory that the freedoms under Articles 19, 21, 22 and 31 are exclusive — each article enacting a code relating to the protection of distinct rights, but this theory was overturned in R.C. Cooper case [(1970) 2 SCC 298 : (1971) 1 SCR 512] where Shah, J., speaking on behalf of the majority pointed out that "Part III of the Constitution weaves a pattern of guarantees on the texture of basic human rights. The guarantees delimit the protection of those rights in their allotted fields they do not attempt to enunciate distinct rights." The conclusion was summarised in these terms : "In our judgment, the assumption in A.K. Gopalan case [AIR 1950 SC 27 : 1950 SCR 88 : 51 Cri LJ 1383] that certain

articles in the Constitution exclusively deal with specific matters — cannot be accepted as correct". It was held in *R.C. Cooper case* [(1970) 2 SCC 298 : (1971) 1 SCR 512] — and that is clear from the judgment of Shah, J., because Shah, J., in so many terms disapproved of the contrary statement of law contained in the opinions of Kania, C.J., Patanjali Sastri, J., Mahajan, J., Mukherjea, J., and S.R. Das, J., in *A.K. Gopalan case* — that even where a person is detained in accordance with the procedure prescribed by law, as mandated by Article 21, the protection conferred by the various clauses of Article 19(1) does not cease to be available to him and the law authorising such detention has to satisfy the test of the applicable freedoms under Article 19, clause (1). This would clearly show that Articles 19(1) and 21 are not mutually exclusive, for, if they were, there would be no question of a law depriving a person of personal liberty within the meaning of Article 21 having to meet the challenge of a fundamental right under Article 19(1). Indeed, in that event, a law of preventive detention which deprives a person of "personal liberty" in the narrowest sense, namely, freedom from detention and thus falls indisputably within Article 22 would not require to be tested on the touchstone of clause (d) of Article 19(1) and yet it was held by a Bench of seven Judges of this Court in *Shambhu Nath Sarkar v. State of West Bengal* [(1973) 1 SCC 856 : 1973 SCC (Cri) 618 : AIR 1973 SC 1425] that such a law would have to satisfy the requirement inter alia of Article 19(1), clause (d) and in *Haradhan Saha v. State of West Bengal* [(1975) 3 SCC 198 : 1974 SCC (Cri) 816 : (1975) 1 SCR 778] which was a decision given by a Bench of five Judges, this Court considered the challenge of clause (d) of Article 19(1) to the constitutional validity of the Maintenance of Internal Security Act, 1971 and held that that Act did not violate the constitutional guarantee embodied in that article. It is indeed difficult to see on what principle we can refuse to give its plain natural meaning to the expression "personal liberty" as used in Article 21 and read it in a narrow and restricted sense so as to exclude those attributes of personal liberty which are specifically dealt with in Article 19. We do not think that this would be a correct way of interpreting the provisions of the

Constitution conferring fundamental rights. The attempt of the Court should be to expand the reach and ambit of the fundamental rights rather than attenuate their meaning and content by a process of judicial construction. The wavelength for comprehending the scope and ambit of the fundamental rights has been set by this Court in R.C. Cooper case [(1970) 2 SCC 298 : (1971) 1 SCR 512] and our approach in the interpretation of the fundamental rights must now be in tune with this wavelength. We may point out even at the cost of repetition that this Court has said in so many terms in R.C. Cooper case [(1970) 2 SCC 298 : (1971) 1 SCR 512] that each freedom has different dimensions and there may be overlapping between different fundamental rights and therefore it is not a valid argument to say that the expression "personal liberty" in Article 21 must be so interpreted as to avoid overlapping between that article and Article 19(1). The expression "personal liberty" in Article 21 is of the widest amplitude and it covers a variety of rights which go to constitute the personal liberty of man and some of them have been raised to the status of distinct fundamental rights and given additional protection under Article 19. Now, it has been held by this Court in Satwant Singh case [AIR 1967 SC 1836 : (1967) 3 SCR 525 : (1968) 1 SCJ 178] that "personal liberty" within the meaning of Article 21 includes within its ambit the right to go abroad and consequently no person can be deprived of this right except according to procedure prescribed by law. Prior to the enactment of the Passports Act, 1967, there was no law regulating the right of a person to go abroad and that was the reason why the order of the Passport Officer refusing to issue passport to the petitioner in Satwant Singh case [AIR 1967 SC 1836 : (1967) 3 SCR 525 : (1968) 1 SCJ 178] was struck down as invalid. It will be seen at once from the language of Article 21 that the protection it secures is a limited one. It safeguards the right to go abroad against executive interference which is not supported by law; and law here means "enacted law" or "state law" (vide A.K. Gopalan case [AIR 1950 SC 27 : 1950 SCR 88 : 51 Cri LJ 1383]). Thus, no person can be deprived of his right to go abroad unless there is a law made by the State prescribing the procedure for so depriving him and the

deprivation is effected strictly in accordance with such procedure. It was for this reason, in order to comply with the requirement of Article 21, that Parliament enacted the Passports Act, 1967 for regulating the right to go abroad. It is clear from the provisions of the Passports Act, 1967 that it lays down the circumstances under which a passport may be issued or refused or cancelled or impounded and also prescribes a procedure for doing so, but the question is whether that is sufficient compliance with Article 21. Is the prescription of some sort of procedure enough or must the procedure comply with any particular requirements? Obviously, the procedure cannot be arbitrary, unfair or unreasonable. This indeed was conceded by the learned Attorney-General who with his usual candour frankly stated that it was not possible for him to contend that any procedure howsoever arbitrary, oppressive or unjust may be prescribed by the law. There was some discussion in *A.K. Gopalan case* [AIR 1950 SC 27 : 1950 SCR 88 : 51 Cri LJ 1383] in regard to the nature of the procedure required to be prescribed under Article 21 and at least three of the learned Judges out of five expressed themselves strongly in favour of the view that the procedure cannot be any arbitrary, fantastic or oppressive procedure. Fazl Ali, J., who was in a minority, went to the farthest limit in saying that the procedure must include the four essentials set out in Prof. Willis' book on Constitutional Law, namely, notice, opportunity to be heard, impartial tribunal and ordinary course of procedure. Patanjali Sastri, J., did not go as far as that but he did say that "certain basic principles emerged as the constant factors known to all those procedures and they formed the core of the procedure established by law". Mahajan, J., also observed that Article 21 requires that "there should be some form of proceeding before a person can be condemned either in respect of his life or his liberty" and "it negatives the idea of fantastic, arbitrary and oppressive forms of proceedings". But apart altogether from these observations in *A.K. Gopalan case* [AIR 1950 SC 27 : 1950 SCR 88 : 51 Cri LJ 1383] which have great weight, we find that even on principle the concept of reasonableness must be projected in the procedure

contemplated by Article 21, having regard to the impact of Article 14 on Article 21.

5. *I.R Coelho v. State of Tamil Nadu*, (2007) 2 SCC 1- 9 Judges

Y.K. Sabharwal, C.J. (for the Court)

“109. Dealing with Articles 14, 19 and 21 in *Minerva Mills* case [(1980) 3 SCC 625] it was said that these clearly form part of the basic structure of the Constitution and cannot be abrogated. It was observed that three articles of our Constitution, and only three, stand between the heaven of freedom into which Tagore wanted his country to awake and the abyss of unrestrained power. ... It is necessary to always bear in mind that fundamental rights have been considered to be heart and soul of the Constitution. Rather these rights have been further defined and redefined through various trials having regard to various experiences and some attempts to invade and nullify these rights. The fundamental rights are deeply interconnected. Each supports and strengthens the work of the others. The Constitution is a living document, its interpretation may change as the time and circumstances change to keep pace with it. This is the ratio of the decision in *Indira Gandhi* case [1975 Supp SCC 1].

...

140. ... Article 21 is the heart of the Constitution. It confers right to life as well as right to choose. When this triangle of Article 21 read with Article 14 and Article 19 is sought to be eliminated not only the “essence of right” test but also the “rights test” has to apply, particularly when *Kesavananda Bharati* [(1973)-4.SCC 225] and *Indira Gandhi* [1975 Supp SCC 1] cases have expanded the scope of basic structure to cover even some of the fundamental rights.

...

149. ... The golden triangle referred to above is the basic feature of the Constitution as it stands for equality and rule of law.”

6. *Mohd. Arif v. Supreme Court of India*, (2014) 9 SCC 737- 5-Judges

Per Rohinton Fali Nariman, J. (for Lodha, C.J. and Khehar, Sikri, JJ. and himself)

25. *In Kharak Singh v. State of U.P.* [(1964) 1 SCR 332 : AIR 1963 SC 1295 : (1963) 2 Cri LJ 329] , *Gopalan's [A.K. Gopalan v. State of Madras, 1950 SCR 88 : AIR 1950 SC 27 : (1950) 51 Cri LJ 1383]* reading of fundamental rights in watertight compartments was reiterated by the majority. However, they went one step further to say that "personal liberty" in Art. 21 takes in and comprises the residue after all the rights granted by Art. 19.

Justices Subba Rao and Shah disagreed. They held:

"The fundamental right of life and personal liberty have many attributes and some of them are found in Art. 19. If a person's fundamental right under Art. 21 is infringed, the State can rely upon a law to sustain the action; but that cannot be a complete answer unless the said law satisfies the test laid down in Art. 19(2) so far as the attributes covered by Art. 19(1) are concerned. In other words, the State must satisfy that both the fundamental rights are not infringed by showing that there is a law and that it does amount to a reasonable restriction within the meaning of Art. 19(2) of the Constitution. But in this case no such defence is available, as admittedly there is no such law. So the petitioner can legitimately plead that his fundamental rights both under Art. 19(1)(d) and Art. 21 are infringed by the State." (at pages 356-357)

26. The minority judgment of Subba Rao and Shah, JJ. eventually became law in Rustom Cavasjee Cooper (Banks Nationalisation) v. Union of India [Rustom Cavasjee Cooper (Banks Nationalisation) v. Union of India, (1970) 1 SCC 248], where the 11-Judge Bench finally discarded Gopalan's [A.K. Gopalan v. State of Madras, 1950 SCR 88 : AIR 1950 SC 27 : (1950) 51 Cri LJ 1383] view and held that various fundamental rights contained in different articles are not mutually exclusive: (SCC p. 289, para 53)

"53. We are therefore unable to hold that the challenge to the validity of the provision for acquisition is liable to be tested only on the ground of non-compliance with Article 31(2). Article 31(2) requires that property must be acquired for a public purpose and that it must be acquired under a law with characteristics set out in that Article. Formal compliance with the conditions under Article 31(2) is not sufficient to negative the protection of the guarantee of the right to property. Acquisition must be under the authority of a law and the expression "law" means a law which is within the competence of the Legislature, and does not impair the guarantee of the rights in Part III. We are unable, therefore, to agree that Articles 19(1)(f) and 31(2) are mutually exclusive."

27. The stage was now set for the judgment in *Maneka Gandhi* [*Maneka Gandhi v. Union of India*, (1978) 2 SCR 621: (1978) 1 SCC 248]. Several judgments were delivered, and the upshot of all of them was that Article 21 was to be read along with other fundamental rights, and so read not only has the procedure established by law to be just, fair and reasonable, but also the law itself has to be reasonable as Articles 14 and 19 have now to be read into Article 21. [See at SCR pp. 646-48 : SCC pp. 393-95, paras 198-204 per Beg, C.J., at SCR pp. 669, 671-74 & 687 : SCC pp. 279-84 & 296-97, paras 5-7 & 18 per Bhagwati, J. and at SCR pp. 720-23 : SCC pp. 335-39, paras 74-85 per Krishna Iyer, J.J. Krishna Iyer, J. set out the new doctrine with remarkable clarity thus: (SCR p. 723 : SCC pp. 338-39, para 85)

"85. To sum up, 'procedure' in Article 21 means fair, not formal procedure. 'Law' is reasonable law, not any enacted piece. As Article 22 specifically spells out the procedural safeguards for preventive and punitive detention, a law providing for such detentions should conform to Article 22. It has been rightly pointed out that for other rights forming part of personal liberty, the procedural safeguards enshrined in Article 21 are available. Otherwise, as the procedural safeguards contained in Article 22 will be available only in cases

of preventive and punitive detention, the right to life, more fundamental than any other forming part of personal liberty and paramount to the happiness, dignity and worth of the individual, will not be entitled to any procedural safeguard save such as a legislature's mood chooses."

...

The wheel has turned full circle. Substantive due process is now to be applied to the fundamental right to life and liberty.

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rendering services which the State considers beneficial in the public interests and which the people have to accept whether they are willing or not. Our conclusion, therefore, is that section 58 is not *ultra vires* of the State Legislature by reason of the fact that it is not a tax but a fee which comes within the purview of entry 47 of List III in Schedule VII of the Constitution.

The result, therefore, is that in our opinion the appeals are allowed only in part and a mandamus will issue in each of these cases restraining the State Government and the Charity Commissioner from enforcing against the appellants the following provisions of the Act to wit:—

(i) Section 44 of the Act to the extent that it relates to the appointment of the Charity Commissioner as a trustee of religious public trust by the court,

(ii) the provisions of clauses (3) to (6) of section 47, and

(iii) clause (c) of section 55 and the part of clause (1) of section 56 corresponding thereto.

The other prayers of the appellants stand dismissed. Each party will bear his own costs in both the appeals.

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[MEHR CHAND MAHAJAN C. J., MUKHERJEA,
S. R. DAS, VIVIAN BOSE, GHULAM HASAN,
BHAGWATI, JAGANNADHADAS and
VENKATARAMA AYYAR JJ.]

Constitution of India, arts. 19(1)(f) and 20(3)—Search warrant issued under s. 96(1) of the Code of Criminal Procedure (Act V of 1898)—Whether ultra vires art. 19(1)(f)—Search and seizure of

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documents under ss. 94 and 96 of the Code of Criminal Procedure—
Whether compelled production thereof—Within the meaning of art.
20(3).

Held, that the provision for the search warrant under the first
alternative of s. 96(1) of the Code of Criminal Procedure does not
offend art. 19(1)(f) of the Constitution.

A search and seizure is only a temporary interference with
the right to hold the property searched and the articles seized.
Statutory recognition in this behalf is a necessary and reasonable
restriction and cannot *per se* be considered to be unconstitu-
tional.

A compelled production of incriminating documents by a per-
son against whom a First Information Report has been made is
testimonial compulsion within the meaning of art. 20(3) of the
Constitution. But a search and seizure of a document under the
provisions of ss. 94 and 96 of the Code of Criminal Procedure is
not a compelled production thereof within the meaning of art. 20
(3) and hence does not offend the said Article.

A power of search and seizure is, in any system of jurispru-
dence, an overriding power of the State for the protection of social
security and that power is necessarily regulated by law. When
the Constitution makers have thought fit not to subject such regu-
lation to constitutional limitations by recognition of the funda-
mental right to privacy, analogous to the American Fourth Amend-
ment, there is no justification for importing into it, a totally
different fundamental right by some process of strained construc-
tion.

Scope and connotation of art. 20(3) explained.

John Lilburn's Case (3 State Trials 1315), *Boyd v. United States* (116 U.S. 616), *Weeks v. United States*, (232 U.S. 383), *Felix Gould v. United States* (255 U.S. 298), *Entick v. Carrington* (19 State Trials 1030), *Hale v. Henkel* (201 U.S. 43), and *Satya Kinkar Roy v. Nikhil Chandra Jyotishopadhaya* (A.I.R. 1951 Cal. 104) referred to.

ORIGINAL JURISDICTION PETITIONS Nos. 372 and 375
of 1953.

Original petition under article 32 of the Constitution
of India for the enforcement of fundamental right.

Veda Vyas and *Daulat Ram Kalia* (S. K. Kapur and
Ganpat Rai, with them) for the petitioners.

C. K. Daphtary, Solicitor General for India (*Porus A. Mehta* and *A. M. Chatterjee*, with him) for the
respondents.

1954. March 15. The Judgment of the Court was
delivered by JAGANNADHADAS J.

JAGANNADHADAS J.—These two applications are for relief under article 32 of the Constitution arising out of similar and connected set of facts and are dealt with together. They arise under the following circumstances. The Registrar of the Joint Stock Companies, Delhi State, lodged information with the Inspector-General, Delhi Special Police Establishment, to the following effect. Messrs. Dalmia Jain Airways Ltd. was registered in his office on the 9th July, 1946, with an authorised capital of Rs. 10 crores and went into liquidation on the 13th June, 1952. An investigation into the affairs of the company was ordered by the Government and the report of the inspector appointed under section 138 of the Indian Companies Act indicated that an organised attempt was made from the inception of the company to misappropriate and embezzle the funds of the company and declare it to be substantial loss, and to conceal from the shareholders the true state of affairs by submitting false accounts and balance-sheets. Various dishonest and fraudulent transactions were also disclosed which show that false accounts with fictitious entries and false records were being maintained and that dishonest transfers of moneys had been made. It was accordingly alleged that offences under sections 406, 408, 409, 418, 420, 465, 467, 468, 471 and 477(a) of the Indian Penal Code had been committed. It was also stated that Seth R. K. Dalmia who was the Director and Chairman of Dalmia Jain Airways Ltd. has been controlling certain other concerns, viz., (1) Dalmia Cement & Paper Marketing Co., Ltd., (2) Dalmia Jain Aviation Ltd. now known as Asia Udyog Ltd., and (3) Allen Berry & Co., Ltd., through his nominees and that all these concerns were utilised in order to commit the frauds. It was further stated therein by the Registrar of Joint Stock Companies that to determine the extent of the fraud, it was necessary to get hold of books not only of Dalmia Jain Airways Ltd. but also of the allied concerns controlled by the Dalmia group, some of which are outside the Delhi State. Lists of the offices and places in which and of the persons in whose custody the records may be available were furnished. Speedy

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investigation was asked for. This information was recorded by the Special Police on the 19th November, 1953, as the First Information Report. On the basis thereof an application was made to the District Magistrate, Delhi, under section 96 of the Criminal Procedure Code, for the issue of warrants for the search of documents and in the places, as per schedules furnished. Permission to investigate in respect of some of the non-cognisable offences mentioned in the First Information Report was also asked for. On the same day, the District Magistrate ordered investigation of the offences and issued warrants for simultaneous searches at as many as 34 places. The searches were made on the 25th November, 1953, and subsequent days and a voluminous mass of records was seized from various places. The petitioners pray that the search warrants may be quashed as being absolutely illegal, and ask for return of the documents seized. In Petition No. 372 of 1953 there are four petitioners of whom the second is the Delhi Glass Works Ltd., and the first the Deputy-General Manager thereof, the third its Secretary and the fourth a shareholder therein. In Petition No. 375 of 1953 there are five petitioners of whom the first is Messrs. Allen Berry & Co., Ltd., second Asia Udyog Ltd., the third Shri R. K. Dalmia, the fourth the Secretary and General Attorney of the third and the fifth a shareholder of petitioners Nos. 1 and 2, and an officer of petitioner No. 2. It will be seen that the petitioners in both the petitions belong to the four concerns, namely, (1) Delhi Glass Works Ltd., (2) Messrs. Allen Berry & Co., Ltd., (3) Asia Udyog Ltd., and (4) Dalmia Jain Airways Ltd. The last three are stated to be Dalmia concerns but it does not appear from the records placed before us what exact connection Delhi Glass Works Ltd. has with them. However, it is admittedly one of the places for which a search warrant was asked for and against which the First Information Report appears to have been lodged. In the petitions various questions were raised. But such of them which raise only irregularities and illegalities of the searches and do not involve any constitutional violation are matters which may

be more appropriately canvassed before the High Court on applications under article 226 of the Constitution and we have declined to go into them. The petitioners have, therefore, confined themselves before us to two grounds on which they challenge the constitutional validity of the searches. The contentions raised are that the fundamental rights of the petitioners under article 20(3) and article 19(1)(f) have been violated by the searches in question.

So far as the contention based on article 19(1)(f) is concerned we are unable to see that the petitioners have any arguable case. Article 19(1)(f) declares the right of all citizens to acquire, hold and dispose of property subject to the operation of any existing or future law in so far as it imposes reasonable restrictions, on the exercise of any of the rights conferred thereby, in the interests of general public. It is urged that the searches and seizures as effected in this case were unreasonable and constitute a serious restriction on the right of the various petitioners, inasmuch as their buildings were invaded, their documents taken away and their business and reputation affected by these largescale and allegedly arbitrary searches and that a law (section 96(1), Cr.P.C.) which authorises such searches violates the constitutional guarantee and is invalid. But, a search by itself is not a restriction on the right to hold and enjoy property. No doubt a seizure and carrying away is a restriction of the possession and enjoyment of the property seized. This, however, is only temporary and for the limited purpose of investigation. A search and seizure is, therefore, only a temporary interference with the right to hold the premises searched and the articles seized. Statutory regulation in this behalf is necessary and reasonable restriction cannot *per se* be considered to be unconstitutional. The damage, if any, caused by such temporary interference if found to be in excess of legal authority is a matter for redress in other proceedings. We are unable to see how any question of violation of article 19(1)(f) is involved in this case in respect of the warrants in question which purport to be under the first

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alternative of section 96(1) of the Criminal Procedure Code.

The only substantial question, therefore, that has been raised is the one relating to article 20(3) which runs as follows :

“No person accused of any offence shall be compelled to be a witness against himself.”

The argument urged before us is that a search to obtain documents, for investigation into an offence is a compulsory procuring of incriminatory evidence from the accused himself and is, therefore, hit by article 20(3) as unconstitutional and illegal. It is not disputed that, *prima facie*, the article in question has nothing to indicate that it comprehends within its scope, the prohibition of searches and seizures of documents from the custody of an accused. But it is urged that this is necessarily implied therein by certain canons of liberal construction which are applicable to the interpretation of constitutional guarantees. In support of this line of argument great reliance has been placed upon American decisions in which similar questions were canvassed. The argument on behalf of the petitioners is presented in the following way. The fundamental guarantee in article 20(3) comprehends within its scope not merely oral testimony given by an accused in a criminal case pending against him, but also evidence of whatever character compelled out of a person who is or is likely to become incriminated thereby as an accused. It, therefore, extends not only to compelled production of documents by an accused from his possession, but also to such compelled production of oral or documentary evidence from any other person who may become incriminated thereby as an accused in future proceedings. If this view of the content of article 20(3) is accepted, the next step in the argument presented is that a forcible search and seizure of documents is, for purposes of constitutional protection of this guarantee, on the same footing as a compelled production of the said documents by the person from whom they are seized. This chain of reasoning, if accepted in its entirety, would render searches and seizures of documents and any

statutory provisions in that behalf illegal and void, as being in violation of the fundamental right under article 20(3). The question thus raised is of far-reaching importance and requires careful consideration.

Article 20(3) embodies the principle of protection against compulsion of self-incrimination which is one of the fundamental canons of the British system of criminal jurisprudence and which has been adopted by the American system and incorporated as an article of its Constitution. It has also, to a substantial extent, been recognised in the Anglo-Indian administration of criminal justice in this country by incorporation into various statutory provisions. In order, therefore, to arrive at a correct appraisal of the scope and content of the doctrine and to judge to what extent that was intended to be recognised by our Constitution-makers in article 20(3), it is necessary to have a cursory view of the origin and scope of this doctrine and the implications thereof as understood in English law and in American law and as recognised in the Indian law.

In English law, this principle of protection against self-incrimination had a historical origin. It resulted from a feeling of revulsion against the inquisitorial methods adopted and the barbarous sentences imposed, by the Court of Star Chamber, in the exercise of its criminal jurisdiction. This came to a head in the case of *John Lilburn*⁽¹⁾ which brought about the abolition of the Star Chamber and the firm recognition of the principle that the accused should not be put on oath and that no evidence should be taken from him. This principle, in course of time, developed into its logical extensions, by way of privilege of witnesses against self-incrimination, when called for giving oral testimony or for production of documents. A change was introduced by the Criminal Evidence Act of 1898 by making an accused a competent witness on his own behalf, if he applied for it. But so far as the oral testimony of witnesses and the production of documents are concerned, the protection against

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self-incrimination continued as before. (See Phipson on Evidence, 9th Edition, pages 215 and 474).

These principles, as they were before the statutory change in 1898, were carried into the American legal system and became part of its common law. (See Wigmore on Evidence, Vol. VIII, pages 301 to 303). This was later on incorporated into their Constitution by virtue of the Fifth Amendment thereof. The language of the Fifth Amendment was considered by the American Courts as being wide enough to cover all the aspects of the principle of protection against self-incrimination as administered under the English common law including oral testimony of witnesses and production of documents. (See Willis on Constitutional Law, pages 518 and 519). In course of time further extensions of that privilege were recognised by the courts relating to searches and seizures. It came to be held that unreasonable searches and seizures of documents fell equally within the mischief of the Fourth and the Fifth Amendments [*Boyd v. United States*(¹)], and that documents or other evidence so obtained were inadmissible in evidence [*Weeks v. United States*(²)].

In the Indian law the extent to which this protection is recognised appears from the various relevant statutory provisions from time to time. Section III of Act XV of 1852 recognised that an accused in a criminal proceeding was not a competent or compellable witness to give evidence for or against himself. This provision was repealed by the Evidence Act I of 1872. But meanwhile the Criminal Procedure Code of 1861 in sections 204 and 203 thereof respectively provided that no oath shall be administered to the accused and that it shall be in the discretion of the Magistrate to examine him. The Criminal Procedure Code of 1872 by section 250 thereof made a general questioning of the accused, after the witnesses for the prosecution had been examined, compulsory and section 345 thereof provided that no oath or affirmation shall be

(1) 116 U.S. 616.

(2) 232 U.S. 383.

administered to the accused person. These features have been continued in the later Codes of Criminal Procedure and have been incorporated into section 342 of the present Criminal Procedure Code of 1898. The only later statutory change, so far, in this behalf, appears to be that brought about by section 7 of the Prevention of Corruption Act, 1947. By virtue of that section an accused is a competent witness on his own application in respect of offences under that Act. So far as witnesses are concerned, section III of Act XV of 1852 also declared the protection of witnesses against compulsion to answer incriminating questions. Shortly thereafter in 1855, this protection was modified by section 32 of Act II of 1855 which made him compellable to answer even incriminating questions but provided immunity from arrest or prosecution on the basis of such evidence or any other kind of use thereof in criminal proceedings except prosecution for giving false evidence. This position has been continued under section 132 of the Evidence Act I of 1872 which is still in force. So far as documents are concerned, it does not appear that the Indian statutory law specifically recognised protection against production of incriminating documents until Evidence Act I of 1872 was enacted which has a provision in this behalf in section 130 thereof. It is not quite clear whether this section which excludes parties to a *suit* applies to an accused. Thus so far as the Indian law is concerned it may be taken that the protection against self-incrimination continues more or less as in the English common law, so far as the accused and production of documents are concerned, but that it has been modified as regards oral testimony of witnesses, by introducing compulsion and providing immunity from prosecution on the basis of such compelled evidence.

Since the time when the principle of protection against self-incrimination became established in English law and in other systems of law which have followed it, there has been considerable debate as to the utility thereof and serious doubts were held in some quarters that this principle has a tendency to defeat justice. In support of the principle it is claimed that the protection

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of accused against self-incrimination promotes active investigation from external sources to find out the truth and proof of alleged or suspected crime instead of extortion of confessions on unverified suspicion. (See Wigmore on Evidence, Vol. VIII, page 309). It is also claimed that that privilege in its application to witnesses as regards oral testimony and production of documents affords to them in general a free atmosphere in which they can be persuaded to come forward to furnish evidence in courts and be of substantial help in elucidating truth in a case, with reference to material within their knowledge and in their possession. (See Wigmore on Evidence, Vol. VIII, page 307). On the other hand, the opinion has been strongly held in some quarters that this rule has an undesirable effect on social interests and that in the detection of crime, the State is confronted with overwhelming difficulties as a result of this privilege. It is said this has become a hiding place of crime and has outlived its usefulness and that the rights of accused persons are amply protected without this privilege and that no innocent person is in need of it. (See Wigmore on Evidence, Vol. VIII, pages 314 and 315). Certain passages at pages 441 and 442 of Vol. 1 of Stephen's History of the Criminal Law of England are also instructive in this context and show a similar divergence of opinion.

In view of the above background, there is no inherent reason to construe the ambit of this fundamental right as comprising a very wide range. Nor would it be legitimate to confine it to the barely literal meaning of the words used, since it is a recognised doctrine that when appropriate a constitutional provision has to be liberally construed, so as to advance the intendment thereof and to prevent its circumvention. Analysing the terms in which this right has been declared in our Constitution, it may be said to consist of the following components. (1) It is a right pertaining to a person "accused of an offence"; (2) It is a protection against "compulsion to be a witness"; and (3) It is a protection against such compulsion resulting in his giving evidence "against himself". The cases with which we are concerned have been

presented to us on the footing that the persons against whom the search warrants were issued, were all of them persons against whom the First Information Report was lodged and who were included in the category of accused therein and that therefore they are persons "accused of an offence" within the meaning of article 20(3) and also that the documents for whose search the warrants were issued, being required for investigation into the alleged offences, such searches were for incriminating material. It may be noticed that some of the accused enumerated in the First Information Report are incorporated companies. But no question has been raised before us that the protection does not apply to corporations or to documents belonging to them—a question about which there has been considerable debate in the American Courts. On the above footing, therefore, the only substantial argument before us on this part of the case was that compelled production of incriminating documents from the possession of an accused is compelling an accused to be a witness against himself. This argument accordingly raises mainly the issue relating to the scope and connotation of the second of the three components above stated.

Broadly stated the guarantee in article 20(3) is against "testimonial compulsion". It is suggested that this is confined to the oral evidence of a person standing his trial for an offence when called to the witness-stand. We can see no reason to confine the content of the constitutional guarantee to this barely literal import. So to limit it would be to rob the guarantee of its substantial purpose and to miss the substance for the sound as stated in certain American decisions. The phrase used in article 20(3) is "to be a witness." A person can "be a witness" not merely by giving oral evidence but also by producing documents or making intelligible gestures as in the case of a dumb witness (see section 119 of the Evidence Act) or the like. "To be a witness" is nothing more than "to furnish evidence", and such evidence can be furnished through the lips or by production of a thing or of a document or in other modes. So far as

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production of documents is concerned, no doubt section 139 of the Evidence Act says that a person producing a document on summons is not a witness. But that section is meant to regulate the right of cross-examination. It is not a guide to the connotation of the word "witness", which must be understood in its natural sense, i.e., as referring to a person who furnishes evidence. Indeed, every positive volitional act which furnishes evidence is testimony, and testimonial compulsion connotes coercion which procures the positive volitional evidentiary acts of the person, as opposed to the negative attitude of silence or submission on his part. Nor is there any reason to think that the protection in respect of the evidence so procured is confined to what transpires at the trial in the court room. The phrase used in article 20(3) is "to be a witness" and not to "appear as a witness". It follows that the protection afforded to an accused in so far as it is related to the phrase "to be a witness" is not merely in respect of testimonial compulsion in the court room but may well extend to compelled testimony previously obtained from him. It is available therefore to a person against whom a formal accusation relating to the commission of an offence has been levelled which in the normal course may result in prosecution. Whether it is available to other persons in other situations does not call for decision in this case.

Considered in this light, the guarantee under article 20(3) would be available in the present cases to these petitioners against whom a First Information Report has been recorded as accused therein. It would extend to any compulsory process for *production* of evidentiary documents which are reasonably likely to support a prosecution against them. The question then that arises next is whether search warrants for the seizure of such documents from the custody of these persons are unconstitutional and hence illegal on the ground that in effect they are tantamount to compelled production of evidence. It is urged that both search and seizure of a document and a compelled production thereof on notice or summons serve the same purpose of being

available as evidence in a prosecution against the person concerned, and that any other view would defeat or weaken the protection afforded by the guarantee of the fundamental right. This line of argument is not altogether without force and has the apparent support of the Supreme Court of the United States of America in *Boyd v. United States*(¹).

The question there which came up for consideration was in fact the converse, namely, whether a compulsory production of documents on the facts of that case amounted to search and seizure. There are dicta in that decision to the effect that a compulsory *production* of a man's private papers is a search and seizure since it affects the sole object thereof and that by this process the court extorts from the party his private books and papers to make him liable for penalty. It is necessary, therefore, to examine this decision rather closely in order to determine how far it can be a safe guide for our purpose. The question therein arose under the following circumstances. In an Act to amend the Customs Revenue Laws, there was a provision which enabled the Government Attorney to make a written motion to the court for the issue of a notice to the opposite party for production of papers in his possession. The motion could be made if in the Attorney's opinion those books contain materials which will prove an alleged fact in support of a charge of defrauding the revenues, involving penalty and forfeiture of merchandise to which the fraud relates. It is also provided by the said section that if the court in its discretion allows the motion in which is set out the fact sought to be proved and calls upon the defendant to produce the documents, and the defendant fails or refuses to produce them without any proper and satisfactory explanation, the allegation of fact sought to be proved by such production may be deemed to have been confessed. The question that thereupon arose was whether an order for production made by the court under that section did not violate the constitutional rights declared by the Fourth and Fifth Amendments of the

(1) 116 U.S. 616.

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American Constitution. These amendments are as follows:

Amendment IV.

"The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated; and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment V.

"No person.....shall be compelled in any criminal case, to be a witness against himself;....."

On the facts of the above case, there was no difficulty in holding that the production of documents in response to the motion granted by the court was a compelled production of incriminating evidence and that it violated the Fifth Amendment. The minority judgment brought this out clearly in the following passage:

"The order of the court under the statute is in effect a *subpoena duces tecum*; and though the penalty for the witness' failure to appear in court with the incriminating papers, is not fine and imprisonment, it is one which may be made more severe, namely, to have the charges against him of a criminal nature taken for confessed and made the foundation of the judgment of the court. That this is within the protection which the Constitution intended against compelling a person to be a witness against himself is, I think, quite clear."

The majority Judges, how ever, went one step further and said as follows:

"The compulsory production of a man's private papers is search and seizure."
and again thus

"We have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself."

Thus in the view that the order for production was tantamount to search and seizure and that in the case it was for a purpose prohibited by the Fifth Amendment, they held that the Fourth Amendment prohibiting unreasonable searches was also violated. The minority Judges, however, did not accept this view and pointed out that there was an essential difference between the seizure of a document on search and the production of a document. But even otherwise, it would appear on a careful consideration of the decision that the majority were at pains to make out that, in the circumstances of the case the order for production would amount to "an unreasonable search and seizure" and is hence unconstitutional as violating the Fourth and Fifth Amendments. The case, therefore, does not lend support for any general doctrine that a search and seizure in all circumstances is tantamount to a compelled production in violation of the Fifth Amendment. That decision itself expressly recognizes the legality of various kinds of searches and indeed the Fourth Amendment itself shows it. Thus what that decision really established was that the obtaining of incriminating evidence by *illegal* search and seizure is tantamount to the violation of the Fifth Amendment. It was in this light that subsequent cases have also understood this decision. [See *Felix Gouled v. United States*(¹)].

Boyd's case(²) has relied on the famous judgment of Lord Camden in *Entick v. Carrington*(³), and learned counsel for the petitioners has also relied on it strenuously before us. Wigmore in his *Law of Evidence*, Vol. VIII, page 368, has shown how some of the assumptions relating to it in *Boyd's* case(²), were inaccurate and misleading. While no doubt Lord Camden refers to the principle of protection against self-accusation with great force, in his consideration of the validity of general search-warrants, that case does not treat a seizure on a search warrant as *ipso facto* tantamount to self-incrimination. All that was said

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(1) 255 U.S. 298; 65 Law. Edn. 647 at 651 and 653.

(2) 116 U.S. 616.

(3) 19 State Trials 1030.

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was that the legal philosophy underlying both is the same, as appears from the following passage:

"It is very certain, that the law obligeth no man to accuse himself; because the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust; and it should seem, that search for evidence is disallowed upon the same principle. There too the innocent would be confounded with the guilty."

It may be noted that Lord Camden's judgment shows, by an elaborate dissertation, that the search warrant therein under consideration was unauthorised and illegal. Thus even the above dictum has reference only to an illegal search.

It is, therefore, impossible to derive from *Boyd's* case⁽¹⁾, support for the proposition that searches and seizures, in general, are violative of the privilege of protection against self-incrimination. Nor is it possible to import that doctrine with its differentiation between legal and illegal searches into our Constitution because we have nothing in our Constitution corresponding to the Fourth Amendment enabling the courts to import the test of unreasonableness or any analogous criterion for discrimination between legal and illegal searches.

In the arguments before us strong reliance has also been placed on the provision of sections 94 and 96 of the Criminal Procedure Code in support of the broad proposition that a seizure of documents on search is in the contemplation of law a compelled production of documents. The sections run as follows:

"94(1). Whenever any court, or in any place beyond the limits of the towns of Calcutta and Bombay, any officer in charge of a police-station considers that the production of any document or other thing is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under this Code by or before such court or officer, such court may issue a summons, or such officer a written order, to the person in whose possession or power such document or thing is believed to be, requiring him to attend

(1) 116 U.S. 616.

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and produce it, or to produce it, at the time and place stated in the summons or order.

.....”

“96(1). Where any Court has reason to believe that a person to whom a summons or order under section 94 or a requisition under section 95, subsection (1), has been or might be addressed will not or would not produce the document or thing as required by such summons or requisition,

or where such document or thing is not known to the court to be in the possession of any person,

or where the court considers that the purposes of any inquiry, trial or other proceeding under this Code will be served by a general search or inspection,

it may issue a search-warrant; and the person to whom such warrant is directed, may search or inspect in accordance therewith and the provisions hereinafter contained.

.....”

It is pointed out that the procedure contemplated is that normally there should be a summons or notice for production under section 94 and it is only if there is no compliance therewith or if the Magistrate is satisfied about the likelihood of non-compliance that a search warrant is to be issued. It is, therefore, urged that these provisions themselves show that in law search and seizure is a substitute for compelled production on summons. There has been some debate before us whether section 94 applies to an accused person and whether there is any element of compulsion in it. For the purpose of this case it is unnecessary to decide these points. We may assume without deciding that the section is applicable to the accused as held by a Full Bench of the Calcutta High Court in a recent case in *Satya Kinkar Roy v. Nikhil Chandra Jyotishopadhaya*(¹). We may also assume that there is an element of compulsion implicit in the process contemplated by section 94 because, in any case, non-compliance results in the unpleasant consequence of invasion of one's premises and rummaging of one's

(1) A.I.R. 1951 Cal. 101.

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private papers by the minions of law under a search warrant. Notwithstanding these assumptions we are unable to read sections 94 and 96(1) of the Criminal Procedure Code as importing any statutory recognition of a theory that search and seizure of documents is compelled production thereof. It is to be noticed that section 96(1) has three alternatives and that the requirement of previous notice or summons and the non-compliance with it or the likelihood of such non-compliance is prescribed only for the first alternative and not for the second or the third. A "general search" and a "search for a document or a thing not known to be in possession of any particular person" are not conditioned by any such requirement. Indeed in cases covered by the second alternative such a requirement cannot even be contemplated as possible. It would, therefore, follow, on the theory propounded, that some at least of the searches within the scope of the second and third alternatives in section 96(1) would fall outside the constitutional protection of article 20(3)—an anomalous distinction for which no justification can be found on principle.

A consideration of the history of Indian statutory legislation relating to searches does not support the theory propounded. The provisions for searches are to be found in the successive Codes of Criminal Procedure. In the earliest Code, Act XXV of 1861, there appears no provision for issuing summons or notices for production of documents, but there was only a provision for the issue of a search warrant by a Magistrate under section 114 thereof, which is in the following terms:

"When a Magistrate shall consider that the production of any thing is essential to the conduct of an enquiry into an offence known or suspected to have been committed, he may grant his warrant to search for such thing; and it shall be lawful for the officer charged with the execution of such warrant to search for such thing in any house or place within the jurisdiction of such Magistrate. In such case the Magistrate may specify in his warrant the house or place, or part thereof, to which only the search shall extend."

There was also section 142 of the said Code which vested in an officer in charge of police station with the power to make a search *suo moto* in certain circumstances. In the next Criminal Procedure Code, Act I of 1872, the relevant provisions were in sections 365, 368 and 379. Section 379 was more or less a repetition of section 142 of the previous Code (Act XXV of 1861) vesting power in a police officer to make a *suo moto* search. Section 365 appears to be the earliest statutory provision for the issue of a summons, either by a police officer or by a court for the production of a document required for investigation. This was followed by section 368 relating to the issue of search-warrants which was in the following terms:

"When a Magistrate considers that the production of anything is essential to the conduct of an inquiry into an offence known or suspected to have been committed or to the discovery of the offender,

or when he considers that such inquiry or discovery will be furthered by the search or inspection of any house or place,

he may grant his search-warrant; and the officer charged with the execution of such warrant may search or inspect any house or place within the jurisdiction of the Magistrate of the District.

The Magistrate issuing such warrant may, if he sees fit, specify in his warrant the house or place, or part thereof, to which only the search or inspection shall extend; and the officer charged with the execution of such warrant shall then search or inspect only the house, place or part so specified."

It will be noticed that even when the procedure of summons for production of documents was introduced, as above in section 365, the provision for the issue of a search-warrant in section 368 had absolutely nothing to do with the question of non-compliance by the concerned person with the summons for production. It is only in the next Criminal Procedure Code, Act X of 1882, that the provisions, sections 94 and 96, appear which correspond to the present sections 94 and 96 of Act V of 1898, linking up to some extent the issue of

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search-warrants with non-compliance or likelihood of non-compliance with a summons to produce. It may be mentioned in passing that the provision for the issue of general search warrants appears for the first time in the Procedure Code of 1882 and even there the issue of such general warrants is not based on non-compliance with a previous summons for production. It is, therefore, clear that there is no basis in the Indian law for the assumption that a search or seizure of a thing or document is in itself to be treated as compelled production of the same. Indeed a little consideration will show that the two are essentially different matters for the purpose relevant to the present discussion. A notice to produce is addressed to the party concerned and his production in compliance therewith constitutes a testimonial act by him within the meaning of article 20(3) as above explained. But search warrant is addressed to an officer of the Government, generally a police officer. Neither the search nor the seizure are acts of the occupier of the searched premises. They are acts of another to which he is obliged to submit and are, therefore, not his testimonial acts in any sense. Even in the American decisions there is a strong current of judicial opinion in support of this distinction. In *Hale v. Henkel*⁽¹⁾, Justice McKenna in his dissenting judgment makes the following observations :

"Search implies a quest by an officer of the law ; a seizure contemplates a forcible dispossession of the owner.....The quest of an officer acts upon the things themselves,—may be secret, intrusive, accompanied by force. The service of a *subpoena* is but the delivery of a paper to a party,—is open and aboveboard. There is no element of trespass or force in it."

A power of search and seizure is in any system of jurisprudence an overriding power of the State for the protection of social security and that power is necessarily regulated by law. When the Constitution makers have thought fit not to subject such regulation to constitutional limitations by recognition of a

(1) 201 U.S. 43; 50 Law. Edn. 652.

fundamental right to privacy, analogous to the American Fourth Amendment, we have no justification to import it, into a totally different fundamental right, by some process of strained construction. Nor is it legitimate to assume that the constitutional protection under article 20(3) would be defeated by the statutory provisions for searches. It is to be remembered that searches of the kind we are concerned with are under the authority of a Magistrate (excepting in the limited class of cases falling under section 165 of the Criminal Procedure Code). Therefore, issue of a search warrant is normally the judicial function of the Magistrate. When such judicial function is interposed between the individual and the officer's authority for search, no circumvention thereby of the fundamental right is to be assumed. We are not unaware that in the present set up of the Magistracy in this country, it is not infrequently that the exercise of this judicial function is liable to serious error, as is alleged in the present case. But the existence of scope for such occasional error is no ground to assume circumvention of the constitutional guarantee.

We are, therefore, clearly of the opinion that the searches with which we are concerned in the present cases cannot be challenged as illegal on the ground of violation of any fundamental rights and that these applications are liable to be dismissed.

As stated at the outset, we have dealt only with the constitutional issues involved in this case leaving the other allegations as to the high-handedness and illegality of the searches open to be raised and canvassed before the High Court on appropriate applications. But we cannot help observing that on those allegations and on the material that has come within our notice, there appears to be scope for serious grievance on the side of the petitioners, which requires scrutiny.

We accordingly dismiss these applications but without costs.

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December, 18.

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v.

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(B. P. SINHA, C. J., S. J. IMAM, K. SUBBA RAO,
J. C. SHAH, N. RAJAGOPALA AYYANGAR, and
J. R. MUDHOLKAR, JJ.)

Fundamental Right, Enforcement of—Scope—Right to freedom of movement and personal liberty, whether infringed—Surveillance—Whether infringes any fundamental right—Constitution of India, Arts. 19 (1) (d), 21, 32—U. P. Police Regulations, Regulation 236.

The petitioner was challenged in a dacoity case but was released as there was no evidence against him. The police opened a history sheet against him. He was put under surveillance as defined in Regulation 236 of the U. P. Police Regulations. Surveillance involves secret picketing of the house or approaches to the houses of the suspects, domiciliary visits at night, periodical enquiries by officers not below the rank of Sub-Inspector into repute, habits, association, income, expenses and occupation, the reporting by constables and chaukidars of movements and absences from home, the verification of movements and absences by means of inquiry slips and the collection and record on a history sheet of all information bearing on conduct.

The petitioner filed a writ petition under Art. 32 in which he challenged the constitutional validity of Chapter XX of U. P. Police Regulations, in which Regulation 236 also occurs.

The defence of the respondent was that the impugned Regulations did not constitute an infringement of any of the freedoms guaranteed by Part III of the Constitution, and even if they were, they had been framed in the interests of the General public and public order and to enable the police to discharge its duty in a more efficient manner, and hence were reasonable restrictions on that freedom.

Held, (Subba Rao and Shah JJ., *dissenting*) that out of the five kinds of surveillance referred to in Regulation 236, the part dealing with domiciliary visits was violative of Art. 21

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of the Constitution and as there was no law on which the same could be justified it must be struck down as unconstitutional, and the petitioner was entitled to a writ of mandamus directing the respondent not to continue domiciliary visits. The other matters constituting surveillance were not unconstitutional. The secret picketing of the houses of the suspects could not in any material or palpable form affect either the right on the part of the suspect to 'move freely' or to deprive him of his 'personal liberty' within the meaning of Art. 21. In dealing with a fundamental right such as the right to free movement or personal liberty, that only can constitute an infringement which is both direct as well as tangible, and it could not be that under these freedoms the Constitution-makers intended to protect or protected mere personal sensitiveness. The term 'picketing' has been used in the Regulation not in the sense of offering resistance to the visitor—physical or otherwise—or even dissuading him from entering the house of the suspect but merely of watching and keeping a record of the visitors. Clauses (c), (d) and (e) of Regulation 236 dealt with the details of the shadowing of the history-sheeters for the purpose of having a record of their movements and activities and the obtaining of information relating to persons with whom they came into contact with a view to ascertain the nature of their activities, and did not infringe any fundamental right of the petitioner. The freedom guaranteed by Art. 19 (1) (d) was not infringed by a watch being kept over the movements of the suspect. Art. 21 was also not applicable. The suspect had the liberty to answer or not to answer the questions put to him by the police, and no Law provided for any civil or criminal liability if the suspect refused to answer a question or remained silent. The right of privacy is not a guaranteed right under our Constitution, and therefore the attempt to ascertain the movements of an individual is merely a manner in which privacy is invaded and is not an infringement of a fundamental right guaranteed in Part III.

The term 'personal liberty' is used in Art. 21 as a compendious term to include within itself all the varieties of rights which go to make up the 'personal liberties' of man other than those dealt with in the several clauses of Art. 19 (1). While Art. 19 (1) deals with particular species or attributes of that freedom, 'personal liberty' in Art. 21 takes in and comprises the residuum. The word "life" in Art. 21 means not merely the right to the continuance of a person's animal existence, but a right to the possession of each of his organs—arms, legs, etc.

The contention of the respondent that if an act of the police involved a trespass to property, that could give rise to a

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claim in tort as that action was not authorised by law, and the remedy of the petitioner was a claim for damages and not a petition under Art. 32, was without any substance and wholly irrelevant for considering whether such action was an invasion of a fundamental right. It is wholly erroneous to assume that before the jurisdiction of this Court under Art. 32 can be invoked, the applicant must either establish that he has no other remedy adequate or otherwise or that he has exhausted such remedies as the law affords and has yet not obtained proper redress, for when once it is proved to the satisfaction of this Court that by State action the fundamental right of the petitioner under Art. 32 has been infringed, it is not only the right but the duty of this Court to afford relief to him by passing appropriate orders in this behalf.

Per Subba Rao and Shah, JJ.—The petitioner was a class A history-sheeter and hence was subject to the entire field of surveillance. Policemen were posted near his house to watch his movements and those of his friends and associates who went to his house. They entered his house in the night and woke him up to ascertain whether he was in the house and thereby disturbed his sleep and rest. The officials, not below the rank of Sub-Inspector, made inquiries from others as regards his habits, associations, income, expenses and occupations. They got information from others as regards his entire way of life. The constables and chaukidars traced his movements, shadowed him and made reports to their superiors. It was conceded that there was no law which imposed restrictions on bad characters.

Held, that the whole of Regulation 236 is unconstitutional and not only cl. (b). The attempt to dissect the act of surveillance into its various ramifications is not realistic. Clauses (a) to (f) of Regulation 236 are the measures adopted for the purpose of supervision or close observation of the movements of the petitioner and are therefore parts of surveillance.

Both Arts. 19(1) and 21 deal with two distinct and independent fundamental rights. The expression "personal liberty" is a comprehensive one and the right to move freely is an attribute of personal liberty. But it is not correct to say that freedom to move freely is carved out of personal liberty and therefore the expression "personal liberty" in Art. 21 excludes that attribute. No doubt, these fundamental rights overlap each other but the question of one being carved

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out of the other does not arise. The fundamental rights of life and personal liberty have many attributes and some of them are found in Art. 19. The State must satisfy that both the fundamental rights are not infringed by showing that there is a law within the meaning of Art. 21 and that it does amount to a reasonable restriction within the meaning of Art. 19(2) of the Constitution.

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The right of personal liberty in Art. 21 implies a right of an individual to be free from restrictions or encroachments on his person, whether those restrictions or encroachments are directly imposed or indirectly brought about by calculated measures. If so understood, all the acts of surveillance under Regulation 236 infringe the fundamental right of the petitioner under Art. 21 of the Constitution.

As regards the fundamental right guaranteed by Art. 19(1)(d), mere movement unobstructed by physical restrictions cannot in itself be the object of a person's travel. A person travels ordinarily in quest of some objective. He goes to a place to enjoy, to do business, to meet friends, to have secret and intimate consultations with other and to do many other such things. If a man is shadowed, his movements are obviously constricted. He can move physically but it can only be a movement of an automation. A movement under the scrutinising gaze of a policeman cannot be described as a free movement. The whole country is his jail. The freedom of movement in Art. 19(1)(d) must, therefore, be a movement in a free country, i.e., in a country where he can do whatever he likes, speak to whomsoever he wants, meet people of his choice without any apprehension, subject of course to the law of social control. The petitioner under the shadow of surveillance is certainly deprived of this freedom. He can move physically, but he cannot do so freely, for all his activities are watched and the shroud of surveillance cast upon him perforce engenders inhibitions in him, and he cannot act freely as he would like to do. Hence, the entire Regulation 236 offends Art. 19(1)(d) of the Constitution.

Held, also that petitioner's freedom under Art. 19(1)(a) of the Constitution was also infringed. It was impossible for a person in the position of the petitioner to express his real and intimate thoughts to the visitor as fully as he would like to do.

A. K. Gopalan v. State of Madras [1950] S.C.R. 88; Munn v. Illinois, (1877) 94 U. S. 113; Wolf v. Colorado, (1949) 338 U. S. 25; Semayne's case (1604) 5 Coke 91 and Bolling v. Sharpe, (1954) 347 U. S. 497, referred to.

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ORIGINAL JURISDICTION : Petition No. 356 of 1961.

Petition under Art. 32 of the Constitution of India for the enforcement of fundamental rights.

J. P. Goyal, for the petitioner.

K. S. Hajela and *C. P. Lal*, for the respondents.

1962. December 18. The Judgment of Sinha, C. J., Imam, Ayyangar and Mudholkar, JJ., was delivered by Ayyangar, J., Subba Rao and Shah, JJ., delivered a separate Judgment.

Ayyangar, J.

AYYANGAR, J.—This petition under Art. 32 of the Constitution challenges the constitutional validity of Ch. XX of the U. P. Police Regulations and the powers conferred upon police officials by its several provisions on the ground that they violate the right guaranteed to citizens by Arts. 19(1)(d) and 21 of the Constitution.

To appreciate the contention raised it is necessary to set out the facts averred on the basis of which the fundamental right of the petitioner is said to be violated, as well as the answers by the respondent-State to these allegations. The petitioner—Kharak Singh—was challaned in a case of dacoity in 1941 but was released under s. 169, Criminals Procedure Code as there was no evidence against him. On the basis of the accusation made against him he states that the police have opened a “history-sheet” in regard to him. Regulation 228 which occurs in Ch. XX of the Police Regulations defines “history-sheets” as “the personal records of criminals under surveillance”. That regulation further directs that a “history-sheet” should be opened only for persons who are or are likely to become habitual criminals or the aiders or abettors of such criminals.

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These history-sheets are of two classes: Class A for dacoits, burglars, cattle-thieves, and railway-goods-wagon thieves, and class B for those who are confirmed and professional criminals who commit crimes other than dacoity, burglary, etc. like professional cheats. It is admitted that a history-sheet in class A has been opened for the petitioner and he is therefore "under surveillance."

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The petitioner describes the surveillance to which he has been subjected thus: Frequently the chaukidar of the village and sometimes police constables enter his house, knock and shout at his door, wake him up during the night and thereby disturb his sleep. On a number of occasions they have compelled him to get up from his sleep and accompany them to the police station to report his presence there. When the petitioner leaves his village for another village or town, he has to report to the chaukidar of the village or at the police station about his departure. He has to give them information regarding his destination and the period within which he would return. Immediately the police station of his destination is contacted by the police station of his departure and the former puts him under surveillance in the same way as the latter. There are other allegations made about misuse or abuse of authority by the chaukidar or the police officials but these have been denied and we do not consider them made out for the purposes of the present petition. If the officials outstep the limits of their authority they would be violating even the instructions given to them, but it looks to us that these excesses of individual officers which are wholly unauthorised could not be complained of in a petition under Art. 32.

In deciding this petition we shall proceed upon the basis that the officers conformed strictly to the terms of the Regulations in Ch. XX properly construed and discard as exaggerated or not proved the

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incidents or pieces of conduct on the part of the authorities which are alleged in the petition but which have been denied. As already pointed out it is admitted that a history-sheet has been opened and a record as prescribed by the Regulations maintained for the petitioner and that such action as is required to be taken in respect of history-sheets of Class A into which the petitioner fell under the classification made in Ch. XX of the Police Regulations is being taken in regard to him. It is stated in the counter affidavit that the police keep a confidential watch over the movements of the petitioner as directed by the Regulations in the interests of the general public and for the maintenance of Public order.

Before entering on the details of these regulations it is necessary to point out that the defence of the State in support of their validity is two-fold: (1) that the impugned regulations do not constitute an infringement of any of the freedoms guaranteed by Part III of the Constitution which are invoked by the petitioner, and (2) that even if they were, they have been framed "in the interests of the general public and public order" and to enable the police to discharge its duties in a more efficient manner and were therefore "reasonable restrictions" on that freedom. Pausing here it is necessary to point out that the second point urged is without any legal basis for if the petitioner were able to establish that the impugned regulations constitute an infringement of any of the freedoms guaranteed to him by the Constitution then the only manner in which this violation of the fundamental right could be defended would be by justifying the impugned action by reference to a valid law, i. e., be it a statute, a statutory rule or a statutory regulation. Though learned counsel for the respondent started by attempting such a justification by invoking s. 12 of the Indian Police Act he gave this up and conceded that the regulations contained in Ch. XX had no such statutory basis but were merely executive or departmental

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instructions framed for the guidance of the police officers. They would not therefore be "a law" which the State is entitled to make under the relevant clauses 2 to 6 of Art. 19 in order to regulate or curtail fundamental rights guaranteed by the several sub-clauses of Art. 19 (1); nor would the same be "a procedure established by law" within Art. 21. The position therefore is that if the action of the police which is the arm of the executive of the State is found to infringe any of the freedoms guaranteed to the petitioner the petitioner would be entitled to the relief of mandamus which he seeks to restrain the State from taking action under the regulations.

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There is one other matter which requires to be clarified even at this stage. A considerable part of the argument addressed to us on behalf of the respondent was directed to showing that the regulations were reasonable and were directed only against those who were on proper grounds suspected to be of proved anti-social habits and tendencies and on whom it was necessary to impose some restraints for the protection of society. We entirely agree that if the regulations had any statutory basis and were a "law" within Art. 13 (3), the consideration mentioned might have an overwhelming and even decisive weight in establishing that the classification was rational and that the restrictions were reasonable and designed to preserve public order by suitable preventive action. But not being any such "law", these considerations are out of place and their constitutional validity has to be judged on the same basis as if they were applied against everyone including respectable and law-abiding citizens not being or even suspected of being, potential dangers to public order.

The sole question for determination therefore is whether "surveillance" under the impugned Ch. XX of the U.P. Police Regulations constitutes an infringement of any of a citizen's fundamental rights

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guaranteed by Part III of the Constitution. The particular Regulation which for all practical purposes defines "surveillance" is Regulation 236 which reads :

"Without prejudice to the right of Superintendents of Police to put into practice any legal measures, such as shadowing in cities, by which they find they can keep in touch with suspects in particular localities or special circumstances, surveillance may for most practical purposes be defined as consisting of one or more of the following measures :

- (a) Secret picketing of the house or approaches to the house of suspects;
- (b) domiciliary visits at night;
- (c) through periodical inquiries by officers not below the rank of Sub-Inspector into repute, habits, associations, income, expenses and occupation;
- (d) the reporting by constables and chaukidars of movements and absence from home;
- (e) the verification of movements and absences by means of inquiry slips;
- (f) the collection and record on a history-sheet of all information bearing on conduct."

Regulation 237 provides that all "history-sheet men" of class A (under which the petitioner falls) "starred" and "unstarred", would be subject to all these measures of surveillance. The other Regulations in the chapter merely elaborate the several items of action which make up the "surveillance" or the shadowing but we consider that nothing material turns on the provisions or their terms.

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Learned Counsel for the petitioner urged that the acts set out in cls. (a) to (f) of Regulation 236 infringed the freedom guaranteed by Art. 19 (1) (d) "to move freely throughout the territory of India" and also that guaranteeing "personal liberty" in Art. 21 which runs:

"No person shall be deprived of his life or personal liberty except according to procedure established by law."

We shall now consider each of these clauses of Regulation 236 in relation to the "freedoms" which it is said they violate:

(a) Secret picketing of the houses of suspects.—

It is obvious that the secrecy here referred to is secrecy from the suspect; in other words its purpose is to ascertain the identity of the person or persons who visit the house of the suspect, so that the police might have a record of the nature of the activities in which the suspect is engaged. This, of course, cannot in any material or palpable form affect either the right on the part of the suspect to "move freely" nor can it be held to deprive him of his "personal liberty" within Art. 21. It was submitted that if the suspect does come to know that his house is being subjected to picketing, that might affect his inclination to move about, or that in any event it would prejudice his "personal liberty". We consider that there is no substance in this argument. In dealing with a fundamental right such as the right to free movement or personal liberty, that only can constitute an infringement which is both direct as well as tangible and it could not be that under these freedoms the Constitution-makers intended to protect or protected mere personal sensitiveness. It was then suggested that such picketing might have a tendency to prevent, if not actually preventing friends of the suspect from

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going to his house and would thus interfere with his right "to form associations" guaranteed by Art. 19 (1) (c). We do not consider it necessary to examine closely and determine finally the precise scope of the "freedom of association" and particularly whether it would be attracted to a case of the type now under discussion, since we are satisfied that "picketing" is used in cl. (a) of this Regulation not in the sense of offering resistance to the visitor—physical or otherwise—or even dissuading him, from entering the house of the suspect but merely of watching and keeping a record of the visitors. This interpretation we have reached (a) on the basis of the provisions contained in the later Regulations in the Chapter, and (b) because more than even the express provisions, the very purpose of the watching and the secrecy which is enjoined would be totally frustrated if those whose duty it is to watch, contacted the visitors, made their presence or identity known and tried to persuade them to any desired course of action.

(b) Domiciliary visits at night. —

"Domiciliary visits" is defined in the Oxford English Dictionary as "Visit to a private dwelling, by official persons, in order to search or inspect it." Webster's Third New International Dictionary defines the word as "Visit to a private dwelling (as for searching it) under authority." The definition in Chambers' Twentieth Century Dictionary is almost identical—"Visit under authority, to a private house for the purpose of searching it." These visits in the context of the provisions in the Regulations are for the purpose of making sure that the suspect is staying at home or whether he has gone out, the latter being presumed in this class of cases, to be with the probable intent of committing a crime. It was urged for the respondent that the allegations in the petition regarding the manner in which "domiciliary visits" are conducted, viz., that the policeman or chaukidar

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enters the house and knocks at the door at night and after awakening the suspect makes sure of his presence at his home had been denied in the counter-affidavit and was not true, and that the policemen as a rule merely watch from outside the suspect's house and make enquiries from third persons regarding his presence or whereabouts. We do not consider that this submission affords any answer to the challenge to the constitutionality of the provision. In the first place, it is clear that having regard to the plain meaning of the words "domiciliary visits," the police authorities are authorised to enter the premises of the suspect, knock at the door and have it opened and search it for the purpose of ascertaining his presence in the house. The fact that in any particular instance or even generally they do not exercise to the full the power which the regulation vests in them, is wholly irrelevant for determining the validity of the regulation since if they are so minded they are at liberty to exercise those powers and do those acts without outstepping the limits of their authority under the regulations.

Secondly, we are, by no means, satisfied that having regard to the terms of Regulation 236 (b) the allegation by the petitioner that police constables knock at his door and wake him up during the night in the process of assuring themselves of his presence at home are entirely false, even if the other allegations regarding his being compelled to accompany the constables during the night to the police station be discarded as mere embellishment.

The question that has next to be considered is whether the intrusion into the residence of a citizen and the knocking at his door with the disturbance to his sleep and ordinary comfort which such action must necessarily involve, constitute a violation of the freedom guaranteed by Art. 19 (1) (d) or "a deprivation" of the "personal liberty" guaranteed

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by Art. 21. Taking first Art. 19 (1) (d) the "freedom" here guaranteed is a right "to move freely" throughout the territory of India. Omitting as immaterial for the present purpose the last words defining the geographical area of the guaranteed movement, we agree that the right to "move" denotes nothing more than a right of locomotion, and that in the context the adverb "freely" would only connote that the freedom to move is without restriction and is absolute, i. e., to move wherever one likes, whenever one likes and however one likes subject to any valid law enacted or made under cl. 5. It is manifest that by the knock at the door, or by the man being roused from his sleep, his locomotion is not impeded or prejudiced in any manner. Learned Counsel suggested that the knowledge or apprehension that the police were on the watch for the movements of the suspect, might induce a psychological inhibition against his movements but, as already pointed out, we are unable to accept the argument that for this reason there is an impairment of the "free" movement guaranteed by sub-cl. (d). We are not persuaded that Counsel is right in the suggestion that this would have any effect even on the mind of the suspect, and even if in any particular case it had the effect of diverting or impeding his movement, we are clear that the freedom guaranteed by Art. 19 (1) (d) has reference to something tangible and physical rather and not to the impponderable effect on the mind of a person which might guide his action in the matter of his movement or locomotion.

The content of Art. 21 next calls for examination. Explaining the scope of the words "life" and "liberty" which occurs in the 5th and 14th Amendments to the U. S. Constitution reading "No personshall be deprived of life, liberty or property without due process of law", to quote the material words, on which Art. 21 is largely modelled, Field, J. observed :

"By the term 'life' as here used something more is meant than mere animal existence. The inhibition against its deprivation extends to all these limits and faculties by which life is enjoyed. The provision equally prohibits the mutilation of the body or amputation of an arm or leg or the putting out of an eye or the destruction of any other organ of the body through which the soul communicates with the outer world.....by the term liberty, as used in the provision something more is meant than mere freedom from physical restraint or the bonds of a prison."

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It is true that in Art. 21, as contrasted with the 4th and 14th Amendment in the U. S., the word "liberty" is qualified by the word "personal" and therefore its content is narrower. But the qualifying adjective has been employed in order to avoid overlapping between those elements or incidents of "liberty" like freedom of speech, or freedom of movement etc., already dealt with in Art. 19 (1) and the "liberty" guaranteed by Art. 21—and particularly in the context of the difference between the permissible restraints or restrictions which might be imposed by sub-cl. 2 to 6 of the article on the several species of liberty dealt with in the several clauses of Art. 19 (1). In view of the very limited nature of the question before us it is unnecessary to pause to consider either the precise relationship between the "liberties" in Art. 19 (1) (a) & (d) on the one hand and that in Art. 21 on the other, or the content and significance of the words "procedure established by law" in the latter article, both of which were the subject of elaborate consideration by this Court in *A. K. Gopalan v. State of Madras* (1). In fact, in *Gopalan's* case there was unanimity of opinion on the question that if there was no enacted law, the freedom guaranteed by Art. 21 would be violated, though the learned Judges differed as to whether any and every enacted

(1) [1950] S.C.R. 88.

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law satisfied the description or requirements of "a procedure established by law."

Before proceeding further a submission on behalf of the respondent requires notice. It was said that if the act of the police involved a trespass to property, i. e., the trespass involved in the act of the police official walking into the premises of the petitioner and knocking at the door, as well as the disturbance caused to him, might give rise to claim in tort, since the action was not authorised by law and that for these breaches of the petitioner's rights damages might be claimed and recovered from the tortfeasor, but that the same could not constitute an infraction of a fundamental right. Similarly it was urged that the petitioner or persons against whom such action was taken might be within their rights in ejecting the trespasser and even use force to effectuate that purpose, but that for what was a mere tort of trespass or nuisance the jurisdiction of this Court under Art. 32 could not be invoked. These submissions proceed on a basic fallacy. The fact that an act by the State executive or by a State functionary acting under a pretended authority gives rise to an action at common law or even under a statute and that the injured citizen or person may have redress in the ordinary courts is wholly immaterial and, we would add, irrelevant for considering whether such action is an invasion of a fundamental right. An act of the State executive infringes a guaranteed liberty only when it is not authorised by a valid law or by any law as in this case, and every such illegal act would obviously give rise to a cause of action—civil or criminal at the instance of the injured person for redress. It is wholly erroneous to assume that before the jurisdiction of this Court under Art. 32 could be invoked the applicant must either establish that he has no other remedy adequate or otherwise or that he has exhausted such remedies as the law affords and has yet not

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obtained proper redress, for when once it is proved to the satisfaction of this court that by State action the fundamental right of a petitioner under Art. 32 has been infringed, it is not only the right but the duty of this Court to afford relief to him by passing appropriate orders in that behalf.

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We shall now proceed with the examination of the width, scope and content of the expression "personal liberty" in Art. 21. Having regard to the terms of Art. 19(1)(d), we must take it that expression is used as not to include the right to move about or rather of locomotion. The right to move about being excluded its narrowest interpretation would be that it comprehends nothing more than freedom from physical restraint or freedom from confinement within the bounds of a prison; in other words, freedom from arrest and detention, from false imprisonment or wrongful confinement. We feel unable to hold that the term was intended to bear only this narrow interpretation but on the other hand consider that "personal liberty" is used in the Article as a compendious term to include within itself all the varieties of rights which go to make up the "personal liberties" of man other than those dealt with in the several clauses of Art. 19(1). In other words, while Art. 19(1) deals with particular species or attributes of that freedom, "personal liberty" in Art. 21 takes in and comprises the residue. We have already extracted a passage from the judgment of Field, J. in *Munn v. Illinois* ⁽¹⁾, where the learned Judge pointed out that "life" in the 5th and 14th Amendments of the U. S. Constitution corresponding to Art. 21, means not merely the right to the continuance of a person's animal existence, but a right to the possession of each of his organs—his arms and legs etc. We do not entertain any doubt that the word "life" in Art. 21 bears the same signification. Is then the word "personal liberty" to be construed as excluding from its purview an invasion on the part

(1) (1877) 94 U.S. 113, 142.

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of the police of the sanctity of a man's home and an intrusion into his personal security and his right to sleep which is the normal comfort and a dire necessity for human existence even as an animal? It might not be inappropriate to refer here to the words of the preamble to the Constitution that it is designed to "assure the dignity of the individual" and therefore of those cherished human value as the means of ensuring his full development and evolution. We are referring to these objectives of the framers merely to draw attention to the concepts underlying the constitution which would point to such vital words as "personal liberty" having to be construed in a reasonable manner and to be attributed that sense which would promote and achieve those objectives and by no means to stretch the meaning of the phrase to square with any preconceived notions or doctrinaire constitutional theories. Frankfurter, J. observed in *Wolf v. Colorado* ⁽¹⁾ :

"The security of one's privacy against arbitrary intrusion by the police..... is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause. The knock at the door, whether by day or by night, as a prelude to a search, without authority of law but solely on the authority of the police, did not need the commentary of recent history to be condemned as inconsistent with the conception of human rights enshrined in the history and the basic constitutional documents of English-speaking peoples..... We have no hesitation in saying that were a State affirmatively to sanction such police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment."

Murphy, J. considered that such invasion was
(1) (1949) 338 U.S. 25.

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against "the very essence of a scheme of ordered liberty".

It is true that in the decision of the U. S. Supreme Court from which we have made these extracts, the Court had to consider also the impact of a violation of the Fourth Amendment which reads :

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

and that our constitution does not in terms confer any like constitutional guarantee. Nevertheless, these extracts would show that an unauthorised intrusion into a person's home and the disturbance caused to him thereby, is as it were the violation of a common law right of a man—an ultimate essential of ordered liberty, if not of the very concept of civilization. An English Common Law maxim asserts that "every man's house is his castle" and in *Semayne's case* (1), where this was applied, it was stated that "the house of everyone is to him as his castle and fortress as well as for his defence against injury and violence as for his repose". We are not unmindful of the fact that *Semayne's case* was concerned with the law relating to executions in England, but the passage extracted has a validity quite apart from the context of the particular decision. It embodies an abiding principle which transcends mere protection of property rights and expounds a concept of "personal liberty" which does not rest on any element of feudalism or on any theory of freedom which has ceased to be of value.

(1) (1604) 5 Coke 91 : 1 Sm. L.C. (13th Edn.) 104, 105.

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In our view cl. (b) of Regulation 236 is plainly violative of Art. 21 and as there is no "law" on which the same could be justified it must be struck down as unconstitutional.

Clauses (c), (d) and (e) may be dealt with together. The actions suggested by these clauses are really details of the shadowing of the history-sheets for the purpose of having a record of their movements and activities and the obtaining of information relating to persons with whom they come in contact or associate, with a view to ascertain the nature of their activities. It was urged by learned Counsel that the shadowing of a person obstructed his free movement or in any event was an impediment to his free movement within Art. 19 (1) (d) of the Constitution. The argument that the freedom there postulated was not confined to a mere physical restraint hampering movement but that the term 'freely' used in the Article connoted a wider freedom transcending mere physical restraints, and included psychological inhibitions we have already considered and rejected. A few minor matters arising in connection with these clauses might now be noticed. For instance, cls. (d) & (e) refer to the reporting of the movements of the suspect and his absence from his home and the verification of movements and absences by means of enquiries. The enquiry for the purpose of ascertaining the movements of the suspect might conceivably take one of two forms : (1) an enquiry of the suspect himself, and (2) of others. When an enquiry is made of the suspect himself the question mooted was that some fundamental right of his was violated. The answer must be in the negative because the suspect has the liberty to answer or not to answer the question for ex concessis there is no law on the point involving him in any liability—civil or criminal—if he refused to answer or remained silent. Does then the fact that an enquiry is made as regards the movements of the

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suspect and the facts ascertained by such enquiry are verified and the true facts sifted constitute an infringement of the freedom to move? Having given the matter our best consideration we are clearly of the opinion that the freedom guaranteed by Art. 19 (1) (d) is not infringed by a watch being kept over the movements of the suspect. Nor do we consider that Art. 21 has any relevance in the context as was sought to be suggested by learned Counsel for the petitioner. As already pointed out, the right of privacy is not a guaranteed right under our Constitution and therefore the attempt to ascertain the movements of an individual which is merely a manner in which privacy is invaded is not an infringement of a fundamental right guaranteed by Part III.

The result therefore is that the petition succeeds in part and Regulation 236 (b) which authorises "domiciliary visits" is struck down as unconstitutional. The petitioner would be entitled to the issue of a writ of mandamus directing the respondent not to continue domiciliary visits. The rest of the petition fails and is dismissed. There will be no order as to costs.

SUBBA RAO, J.— We have had the advantage of perusing the judgment prepared by our learned brother Rajagopala Ayyangar, J. We agree with him that Regulation 236 (b) is unconstitutional, but we would go further and hold that the entire Regulation is unconstitutional on the ground that it infringes both Art. 19 (1) (d) and Art. 21 of the Constitution.

This petition raises a question of far-reaching importance, namely, a right of a citizen of India to lead a free life subject to social control imposed by valid law. The fact that the question has been raised at the instance of an alleged disreputable character shall not be allowed to deflect our perspective. If the police could do what they did to the petitioner, they

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could also do the same to an honest and law-abiding citizen.

Let us at the outset clear the ground. We are not concerned here with a law imposing restrictions on a bad character, for admittedly there is no such law. Therefore, the petitioner's fundamental right, if any, has to be judged on the basis that there is no such law. To state it differently, what fundamental right of the petitioner has been infringed by the acts of the police? If he has any fundamental right which has been infringed by such acts, he would be entitled to a relief straight away, for the State could not justify it on the basis of any law made by the appropriate Legislature or the rules made thereunder.

The petitioner in his affidavit attributes to the respondents the following acts :—

"Frequently the chaukidar of the village and sometimes police constables awake him in the night and thereby disturb his sleep. They shout at his door and sometimes enter inside his house. On a number of occasions they compel him to get up from his sleep and accompany them to the police station, Civil Lines, Meerut, (which is three miles from the petitioner's village) to report his presence there. When the petitioner leaves his village for another village or town, he has to report to the chaukidar of the village or at the police station about his departure. He has to give information regarding his destination and the period within which he will return. Immediately the police station of his destination is contacted by the police station of his departure and the former puts him under surveillance in the same way as the latter does."

"It may be pointed out that the chaukidar of the village keeps a record of the presence and

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absence of the petitioner in a register known as chaukidar's Crime Record Book.

"All the entries in this book are made behind the petitioner's back and he is never given any opportunity of examining or inspecting these records."

There are other allegations made about the misuse or abuse of authority by the chaukidar or the police officials.

In the counter-affidavit filed by the respondents it is admitted that the petitioner is under the surveillance of the police, but the allegations of abuse of powers are denied. A perusal of the affidavit and the counter-affidavit shows that the petitioner tries to inflate the acts of interference by the police in his life, while the respondents attempt to deflate it to the minimum. In the circumstances we would accept only such of the allegations made by the petitioner in his affidavit which are in conformity with the act of surveillance described by Regulation 236 of Chapter XX of the U. P. Police Regulations. The said Regulation reads :—

"Without prejudice to the right of Superintendents of Police to put into practice any legal measures, such as shadowing in cities, by which they find they can keep in touch with suspects in particular localities or special circumstances, surveillance may for most practical purposes be defined as consisting of one or more of the following measures :—

- (a) Secret picketing of the house or approaches to the houses of suspects;
- (b) Domiciliary visits at night;

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- (c) through periodical inquiries by officers not below the rank of Sub-Inspector into repute, habits, associations, income, expenses and occupation;
- (d) the reporting by constables and chaukidars of movements and absences from home;
- (e) the verification of movements and absences by means of inquiry slips;
- (f) the collection and record on a history-sheet of all information bearing on conduct."

Regulation 237 provides that all "history-sheet men" of Class A, "starred" and "unstarred", would be subject to all the said measures of surveillance. It is common case that the petitioner is a Class A history-sheeter and, therefore, he is subject to the entire field of surveillance.

Before we construe the scope of the said Regulation, it will be necessary to ascertain the meaning of some technical words used therein. What does the expression "surveillance" mean? Surveillance conveys the idea of supervision and close observance. The person under surveillance is not permitted to go about unwatched. Clause (a) uses the expression "secret-picketing". What does the expression mean? Picketing has many meanings. A man or a party may be stationed by trade union at a workshop to deter would-be workers during strike. Social workers may stand at a liquor shop to intercept people going to the shop to buy liquor and prevail upon them to desist from doing so. Small body of troops may be sent out as a picket to watch for the enemy. The word "picketing" may, therefore, mean posting of certain policemen near the house or approaches of the house of a person to watch his movements and to prevent people going to his house or having association with him. But the adjective "secret" qualifies

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The word "picketing and to some extent limits its meaning. What does the expression "secret" mean? Secret from whom? Does it mean keeping secret from the man watched as well as from the people who go to his house? Though the expression is not clear, we will assume that secret-picketing only means posting of the police at the house of a person to watch his movements and those of his associates without their knowledge. But in practice, whatever may have been the intention of the authorities concerned, it is well nigh impossible to keep it secret. It will be known to everybody including the person watched.

The next expression is "domiciliary visit" at night. Domiciliary means "of a dwelling place". A domiciliary visit is a visit of officials to search or inspect a private house.

Having ascertained the meaning of the said three expressions, let us see the operation of the Regulation and its impact on a person like the petitioner who comes within its scope. Policemen were posted near his house to watch his movements and those of his friends or associates who went to his house. They entered his house in the night and woke him up to ascertain whether he was in the house and thereby disturbed his sleep and rest. The officials not below the rank of Sub-Inspector made inquiries obviously from others as regards his habits, associations, income, expenses and the occupation, i.e., they got information from others as regards his entire way of life. The constables and the chaukidars traced his movements, shadowed him and made reports to the superiors. In short, his entire life was made an open-book and every activity of his was closely observed and followed. It is impossible to accept the contention that this could have been made without the knowledge of the petitioner or his friends, associates and others in the locality. The attempt to dissect the act of surveillance into its various ramifications

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is not realistic. Clause (a) to (f) are the measures adopted for the purpose of supervision or close observation of his movements and are, therefore, parts of surveillance. The question is whether such a surveillance infringes any of the petitioner's fundamental rights.

Learned Counsel for the petitioner contends that by the said act of surveillance the petitioner's fundamental rights under cls. (a) and (d) of Art. 19 (1) and Art. 21 are infringed. The said Articles read:—

Art. 21 : No person shall be deprived of his life or personal liberty except according to procedure established by law.

Art. 19 (1): All citizens shall have the right—

(a) to freedom of speech and expression;

x x x x x x

(d) to move freely throughout the territory of India.

At this stage it will be convenient to ascertain the scope of the said two provisions and their relation *inter se* in the context of the question raised. Both of them are distinct fundamental rights. No doubt the expression "personal liberty" is a comprehensive one and the right to move freely is an attribute of personal liberty. It is said that the freedom to move freely is carved out of personal liberty and, therefore, the expression "personal liberty" in Art. 21 excludes that attribute. In our view, this is not a correct approach. Both are independent fundamental rights, though there is overlapping. There is no question of one being carved out of another. The fundamental right of life and personal liberty have many attributes and some of them are found in Art. 19. If a

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persons' fundamental right under Art. 21 is infringed, the State can rely upon a law to sustain the action; but that cannot be a complete answer unless the said law satisfies the test laid down in Art. 19 (2) so far as the attributes covered by Art. 19 (1) are concerned. In other words, the State must satisfy that both the fundamental rights are not infringed by showing that there is a law and that it does amount to a reasonable restriction within the meaning of Art. 19 (2) of the Constitution. But in this case no such defence is available, as admittedly there is no such law. So the petitioner can legitimately plead that his fundamental rights both under Art. 19 (1) (d) and Art. 21 are infringed by the State.

Now let us consider the scope of Art. 21. The expression "life" used in that Article cannot be confined only to the taking away of life, i.e., causing death. In *Munn v. Illinois* (1), Field, J., defined "life" in the following words:

"Something more than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. The provision equally prohibits the mutilation of the body by the amputation of an arm or leg, or the putting out of an eye, or the destruction of any other organ of the body through which the soul communicates with the outer world."

The expression "liberty" is given a very wide meaning in America. It takes in all the freedoms. In *Bolling v. Sharpe* (2), the Supreme Court of America observed that the said expression was not confined to mere freedom from bodily restraint and that liberty under law extended to the full range of conduct which the individual was free to pursue. But this absolute right to liberty was regulated to protect other social interests by the State exercising its powers

(1) (1877) 94 U.S. 113.

(2) (1954) 347 U.S. 497, 499.

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such as police power, the power of eminent domain, the power of taxation etc. The proper exercise of the power which is called the due process of law is controlled by the Supreme Court of America. In India the word "liberty" has been qualified by the word "personal", indicating thereby that it is confined only to the liberty of the person. The other aspects of the liberty have been provided for in other Articles of the Constitution. The concept of personal liberty has been succinctly explained by Dicey in his book on Constitutional Law, 9th edn. The learned author describes the ambit of that right at pp. 207-208 thus:

"The right not to be subjected to imprisonment, arrest or other physical coercion in any manner that does not admit of legal justification."

Blackstone* in his commentaries on the Laws of England, Book 1, at p. 134, observed :

"Personal liberty" includes "the power to locomotion of changing situation, or removing one's person to whatsoever place one's inclination may direct, without imprisonment or restraint, unless by due course of law."

In *A. K. Gopalan's case* ⁽¹⁾, it is described to mean liberty relating to or concerning the person or body of the individual; and personal liberty in this sense is the antithesis of physical restraint or coercion. The expression is wide enough to take in a right to be free from restrictions placed on his movements. The expression "coercion" in the modern age cannot be construed in a narrow sense. In an uncivilized society where there are no inhibitions, only physical restraints may detract from personal liberty, but as civilization advances the psychological restraints are more effective than physical ones. The scientific methods used to condition a man's mind are in a real sense physical restraints, for they engender physical

(1) [1950] S.C.R. 88.

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fear channelling one's actions through anticipated and expected grooves. So also the creation of conditions which necessarily engender inhibitions and fear complexes can be described as physical restraints. Further, the right to personal liberty takes in not only a right to be free from restrictions placed on his movements, but also free from encroachments on his private life. It is true our Constitution does not expressly declare a right to privacy as a fundamental right, but the said right is an essential ingredient of personal liberty. Every democratic country sanctifies domestic life; it is expected to give him rest, physical happiness, peace of mind and security. In the last resort, a person's house, where he lives with his family, is his "castle": it is his rampart against encroachment on his personal liberty. The pregnant words of that famous Judge, Frankfurter J., in *Wolf v. Colorado* ⁽¹⁾, pointing out the importance of the security of one's privacy against arbitrary intrusion by the police, could have no less application to an Indian home as to an American one. If physical restraints on a person's movements affect his personal liberty, physical encroachments on his private life would affect it in a larger degree. Indeed, nothing is more deleterious to a man's physical happiness and health than a calculated interference with his privacy. We would, therefore, define the right of personal liberty in Art. 21 as a right of an individual to be free from restrictions or encroachments on his person, whether those restrictions or encroachments are directly imposed or indirectly brought about by calculated measures. If so understood, all the acts of surveillance under Regulation 236 infringe the fundamental right of the petitioner under Art. 21 of the Constitution.

This leads us to the second question, namely, whether the petitioner's fundamental right under Art. 19 (1) (d) is also infringed. What is the content of the said fundamental right? It is argued for the

(1) (1949) 338 U.S. 25.

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State that it means only that a person can move physically from one point to another without any restraint. This argument ignores the adverb "freely" in cl. (d). If that adverb is not in the clause, there may be some justification for this contention; but the adverb "freely" gives a larger content to the freedom. Mere movement unobstructed by physical restrictions cannot in itself be the object of a person's travel. A person travels ordinarily in quest of some objective. He goes to a place to enjoy, to do business, to meet friends, to have secret and intimate consultations with others and to do many other such things. If a man is shadowed, his movements are obviously constricted. He can move physically, but it can only be a movement of an automation. How could a movement under the scrutinizing gaze of the policemen be described as a free movement? The whole country is his jail. The freedom of movement in cl. (d) therefore must be a movement in a free country, i. e., in a country where he can do whatever he likes, speak to whomsoever he wants, meet people of his own choice without any apprehension, subject of course to the law of social control. The petitioner under the shadow of surveillance is certainly deprived of this freedom. He can move physically, but he cannot do so freely, for all his activities are watched and noted. The shroud of surveillance cast upon him perforce engender inhibitions in him and he cannot act freely as he would like to do. We would, therefore, hold that the entire Regulation 236 offends also Art. 19 (1) (d) of the Constitution.

Assuming that Art. 19 (1) (d) of the Constitution must be confined only to physical movements, its combination with the freedom of speech and expression leads to the conclusion we have arrived at. The act of surveillance is certainly a restriction on the said freedom. It cannot be suggested that the said freedom is also bereft of its subjective or psychological content, but will sustain only the mechanics

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of speech and expression. An illustration will make our point clear. A visitor, whether a wife, son or friend, is allowed to be received by a prisoner in the presence of a guard. The prisoner can speak with the visitor; but, can it be suggested that he is fully enjoying the said freedom? It is impossible for him to express his real and intimate thoughts to the visitor as fully as he would like. But the restrictions on the said freedom are supported by valid law. To extend the analogy to the present case is to treat the man under surveillance as a prisoner within the confines of our country and the authorities enforcing surveillance as guards, without any law of reasonable restrictions sustaining or protecting their action. So understood, it must be held that the petitioner's freedom under Art. 19 (1) (a) of the Constitution is also infringed.

It is not necessary in this case to express our view whether some of the other freedoms enshrined in Art. 19 of the Constitution are also infringed by the said Regulation.

In the result, we would issue an order directing the respondents not to take any measure against the petitioner under Regulation 236 of Chapter XX of the U. P. Police Regulations. The respondents will pay the costs of the petitioner.

BY COURT : In accordance with the opinion of the majority this Writ Petition is partly allowed and Regulation 236 (b) which authorises "domiciliary visits" is struck down as unconstitutional. The Petitioner would be entitled to the issue of a writ of *mandamus* directing the respondent not to continue domiciliary visits. The rest of the petition fails and is dismissed. There will be no order as to costs.

1962
Kharak Singh
v.
The State of U.P.
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(1975) 2 Supreme Court Cases 148

(Before K. K. Mathew, V. R. Krishna Iyer and P. K. Goswami; JJ.)
GOBIND .. Petitioner :

Versus

STATE OF MADHYA PRADESH AND ANOTHER .. Respondents.

Writ Petition No. 72 of 1970†, decided on March 18, 1975

Constitution of India — Part III — Right of privacy — Whether emanates from the rights guaranteed in Part III and in particular Articles 19(1)(a), (d) and 21 — Right if exists is absolute — Whether violated by Regulations 855 and 856 of M. P. Police Regulations providing for surveillance — Restricted interpretation of the Regulations to save them from unconstitutionality

The petitioner, a citizen of India, alleges that several false cases have been filed against him in criminal courts by the police but that he was acquitted in all but two cases. He says that on the basis that he is a habitual criminal, the police have opened a history sheet against him and that he has been put under surveillance.

The petitioner says that the police are making domiciliary visits both by day and by night at frequent intervals, that they are secretly picketing his house and the approaches to his house, that his movements are being watched by the patel of the village and that when the police come to the village for any purpose, he is called and harassed with the result that his reputation has sunk low in the estimation of his neighbours. The petitioner submits that whenever he leaves the village for another place he has to report to the chowkidar of the village or to the police station about his departure and that he has to give further information about his destination and the period within which he would return. The petitioner contends that these actions of the police are violative of the fundamental right guaranteed to him under Articles 19(1)(d) and 21 of the Constitution, and he prays for a declaration that Regulations 855 and 856 are void as contravening his fundamental rights under the above articles. The case of the respondent State is that the petitioner is a dangerous criminal whose conduct shows that he is determined to lead a criminal life and that he was put under surveillance in order to prevent him from committing offences.

Held :

Privacy-dignity claims deserve to be examined with care and to be denied only when an important countervailing interest is shown to be superior. If the Court does find that a claimed right is entitled to protection as a fundamental privacy right, a law infringing it must satisfy the compelling State interest test. Then the question would be whether a State interest is of such paramount importance as would justify an infringement of the right. Obviously, if the enforcement of morality were held to be a compelling as well as a permissible State interest, the characterisation of a claimed right as a fundamental privacy right would be of far less significance. The question whether enforcement of morality is a State interest sufficient to justify the infringement of a fundamental privacy right need not be considered for the purpose of the present case. (Para 22)

Therefore the Supreme Court refused to consider whether enforcement of morality is a function of State. (Para 22)

Privacy primarily concerns the individual. It therefore relates to and overlaps with the concept of liberty. The most serious advocate of privacy must confess that there are serious problems of defining the essence and scope of the right. Privacy interest in autonomy must also be placed in the context of other rights and values. (Para 23)

†Petition under Article 32 of the Constitution of India.

Any right to privacy must encompass and protect the personal intimacies of the home, the family, marriage, motherhood, procreation and child rearing. This catalogue approach to the question is obviously not as instructive as it does not give analytical picture of the distinctive characteristics of the right of privacy. Perhaps, the only suggestion that can be offered as unifying principle underlying the concept has been the assertion that a claimed right must be a fundamental right implicit in the concept of ordered liberty. (Para 24)

Rights and freedoms of citizens are set forth in the Constitution in order to guarantee that the individual, his personality and those things stamped with his personality shall be free from official interference except where a reasonable basis for intrusion exists. In this sense, many of the fundamental rights of citizens can be described as contributing to the right of privacy. (Para 25)

The right to privacy in any event will necessarily have to go through a process of case-by-case development. Therefore, even assuming that the right to personal liberty, the right to move freely throughout the territory of India and the freedom of speech create an independent right of privacy as an emanation from them which one can characterize as a fundamental right, it cannot be said that the right is absolute. (Para 28)

Minority Judgment in *Kharak Singh v. State of U. P.*, (1964) 1 SCR 332 : AIR 1963 SC 1295 : (1963) 2 Cri LJ 329, *relied on*.

Munn v. Illinois, (1877) 94 US 113, 142; *Wolf v. Colorado*, (1949) 338 US 25; *Griswold v. Connecticut*, 381 US 479, 510; *Jane Roe v. Henry Wade*, 410 US 113 and *Olmstead v. U. S.*, 277 US 438, 471, *relied on*.

Drastic inroads directly into the privacy and indirectly into the fundamental rights, of a citizen will be made if Regulations 855 and 856 were to be read widely. To interpret the rule in harmony with the Constitution is therefore necessary and canalisation of the powers vested in the police by the two regulations becomes necessary if they are to be saved at all. (Para 30)

Depending on the character and antecedents of the person subjected to surveillance as also the objects and the limitation under which surveillance is made, it cannot be said surveillance by domiciliary visits would always be unreasonable restriction upon the right of privacy. Assuming that the fundamental rights explicitly guaranteed to a citizen have penumbral zones and that the right to privacy is itself a fundamental right, that fundamental right must be subject to restriction on the basis of compelling public interest. (Para 31)

Regulation 855 empowers surveillance only of persons against whom reasonable materials exist to induce the opinion that they show 'a determination, to lead a life of crime' — crime in this context being confined to such as involve public peace or security only and if they are dangerous security risks. Mere convictions in criminal cases where nothing gravely imperilling the safety of society is involved cannot be regarded as warranting surveillance under this regulation. Similarly, domiciliary visits and picketing by the police should be reduced to the clearest cases of danger to community security and not routine follow-up at the end of a conviction or release from prison or at the whim of a police officer. (Para 33)

If any action is taken beyond the above boundaries the citizen will be entitled to attack such action as unconstitutional and void. (Para 30)

Constitution of India — Article 21 — Regulations 855 and 856 of the M. P. Police Regulations providing for surveillance — Whether intra vires having force of law — Article 21 if violated

Held :

The impugned regulations were framed by the Government of M. P. under Section 46(2)(c) of the Police Act and are for the purpose of giving effect to its provisions and hence intra vires and have the force of law. Therefore it cannot

be said that Article 21 is violated. The procedure is reasonable having regard to the provisions of Regulations 853(c) and 857. (Paras 8 to 11 and 31)

Kharak Singh v. State of U. P., (1964) 1 SCR 332 : AIR 1963 SC 1295 : (1963) 2 Cri LJ 329, distinguished.

Constitutional Interpretation — Of two interpretations the validating one will be preferred

Held :

When there are two interpretations, one wide and unconstitutional, the other narrower but within constitutional bounds, the Supreme Court will read down the overflowing expressions to make them valid. (Para 33)

Petition dismissed

M/2429/CR

Advocates who appeared in this case :

A. K. Gupta and R. A. Gupta, Advocates, for the Petitioner ;

Ram Panjwani, H. S. Parihar and I. N. Shroff, Advocates, for the Respondents.

The Judgment of the Court was delivered by

MATHEW, J.—The petitioner is a citizen of India. He challenges the validity of Regulations 855 and 856 of the Madhya Pradesh Police Regulations purporting to be made by the Government of Madhya Pradesh under Section 46(2)(c) of the Police Act, 1961.

2. The petitioner alleges that several false cases have been filed against him in criminal courts by the police but that he was acquitted in all but two cases. He says that on the basis that he is a habitual criminal, the police have opened a history sheet against him and that he has been put under surveillance.

3. The petitioner says that the police are making domiciliary visits both by day and by night at frequent intervals, that they are secretly picketing his house and the approaches to his house, that his movements are being watched by the *patel* of the village and that when the police come to the village for any purpose, he is called and harassed with the result that his reputation has sunk low in the estimation of his neighbours. The petitioner submits that whenever he leaves the village for another place he has to report to the chowkidar of the village or to the police station about his departure and that he has to give further information about his destination and the period within which he would return. The petitioner contends that these actions of the police are violative of the fundamental right guaranteed to him under Articles 19(1)(d) and 21 of the Constitution, and he prays for a declaration that Regulations 855 and 856 are void as contravening his fundamental rights under the above Articles.

4. In the return filed, it is stated that

the petitioner has managed to commit many crimes during the period 1960 to 1969. In the year 1962 the petitioner was convicted in one case under Section 452 IPC and was fined Rs. 100 in default rigorous imprisonment of two months and in another case he was convicted under Section 456 IPC and was fined Rs. 50 and in default rigorous imprisonment of one month. In the year 1969 the petitioner was convicted under Section 55/109 Cr. P. C. and was bound over for a period of one year by SDM, Jatara. In the year 1969, the petitioner got compounded a case pending against him under Section 325/147/324 IPC. Similarly, he also got another case under Section 341/324 IPC compounded.

The case of the respondent in short is that the petitioner is a dangerous criminal whose conduct shows that he is determined to lead a criminal life and that he was put under surveillance in order to prevent him from committing offences.

5. Regulation 855 reads :

855. Surveillance proper, as distinct from general supervision, should be restricted to those persons, whether or not previously convicted, whose conduct shows a determination to lead a life of crime. The list of persons under surveillance should include only those persons who are believed to be really dangerous criminals. When the entries in a history sheet, or any other information at his disposal, leads the District Superintendent to believe that a particular individual is leading a life of crime, he may order that his name be entered in the surveillance register. The Circle Inspector will thereupon (open a?) history sheet, if one is not already in existence, and the man will be placed under regular surveillance.

Regulation 856 provides :

856. Surveillance may, for practical purposes, be defined as consisting of the following measures :

- (a) Thorough periodical enquiries by the station-house officer as to repute, habits, association, income, expenses and occupation.
- (b) Domiciliary visits both by day and night at frequent but irregular intervals.
- (c) Secret picketing of the house and approaches on any occasion when the surveillance (surveillant?) is found absent.
- (d) The reporting by patels, mukaddams and kotwars of movements and absences from home.
- (e) The verification of such movements and absences by means of bad character rolls.
- (f) The collection in a history sheet of all information bearing on conduct.

It must be remembered that the surest way of driving a man to a life of crime is to prevent him from earning an honest living. Surveillance should, therefore, never be an impediment to steady employment and should not be made unnecessarily irksome or humiliating. The person under surveillance should, if possible be assisted in finding steady employment, and the practice of warning persons against employing him must be strongly discouraged.

6. In *Kharak Singh v. State of U. P.*¹ this Court had occasion to consider the validity of Regulation 236 of the U. P. Police Regulations which is in *pari materia* with Regulation 856 here. There it was held by a majority that Regulation 236(b) providing for domiciliary visits was unconstitutional for the reason that it abridged the fundamental right of a person under Article 21 and since Regulation 236(b) did not have the force of law, the regulation was declared bad. The other provisions of the regulation were held to be constitutional. The decision that the regulation in question there was not law was based upon a concession made on behalf of the State of U. P. that the U. P. Police Regulations were not framed under any of the provisions of the Police Act.

7. The petitioner submitted that as the regulations in question here were also not framed under any provision of the Police Act, the provisions regarding domiciliary visits in Regulations 855 and 856 must be declared bad and that even if the regulations were framed under Sec-

1. (1964) 1 SCR 332; AIR 1963 SC 1295; (1963) 2 Cri LJ 329.

tion 46(2)(c) of the Police Act, they offended the fundamental right of the petitioner under Article 19(1)(d) as well as under Article 21 of the Constitution.

8. So far as the first contention is concerned, we are of the view that the regulations were framed by the Government of Madhya Pradesh under Section 46(2)(c) of the Police Act. Section 46(2) states that the State Government may, from time to time, by notification in the official gazette, make rules consistent with the Act—

(c) generally, for giving effect to the provisions of this Act.

9. The petitioner contended that rules can be framed by the State Government under Section 46(2)(c) only for giving effect to the provisions of the Act and that the provisions in Regulation 856 for domiciliary visits and other matters are not for the purpose of giving effect to any of the provisions of the Police Act and therefore Regulation 856 is ultra vires.

10. We do not think that the contention is right. There can be no doubt that one of the objects of the Police Act is to prevent commission of offences. The preamble to the Act states :

Whereas it is expedient to re-organise the police and to make it a more efficient instrument for the prevention and detection of crime.

And, Section 23 of the Act (so far as it is material) reads :

It shall be the duty of every police officer . . . to prevent the commission of offences and public nuisances. . . .

11. We think that the provision in Regulation 856 for domiciliary visits and other actions by the police is intended to prevent the commission of offences. The object of domiciliary visits is to see that the person subjected to surveillance is in his home and has not gone out of it for commission of any offence. We are therefore of opinion that Regulations 855 and 856 have the force of law.

12. The next question is whether the provisions of Regulation 856 offend any of the fundamental rights of the petitioner.

13. In *Kharak Singh v. State of U. P.* (supra) the majority said that 'personal liberty' in Article 21 is comprehensive to include all varieties of rights which go to make up the personal liberty of a man other than those dealt with in Article 19(1)(d). According to the Court, while Article 19(1)(d) deals with the particular types of personal freedom, Article 21 takes in and deals with the residue. The Court said :

We have already extracted a passage from the judgment of Field, J. in *Munn v. Illinois* where the learned Judge pointed out that 'life' in the 5th and 14th Amendments of the U. S. Constitution corresponding to Article 21 means not merely the right to the continuance of a person's animal existence, but a right to the possession of each of his organs — his arms and legs etc. We do not entertain any doubt that the word 'life' in Article 21 bears the same signification. Is then the word 'personal liberty' to be construed as excluding from its purview an invasion on the part of the police of the sanctity of a man's home and an

intrusion into his personal security and his right to sleep which is the normal comfort and a dire necessity for human existence even as an animal? It might not be inappropriate to refer here to the words of the preamble to the Constitution that it is designed to "assure the dignity of the individual" and therefore of those cherished human values as the means of ensuring his full development and evolution. We are referring to these objectives of the framers merely to draw attention to the concepts underlying the Constitution which would point to such vital words as 'personal liberty' having to be construed in a reasonable manner and to be attributed that sense which would promote and achieve those objectives and by no means to stretch the meaning of the phrase to square with any preconceived notions or doctrinaire constitutional theories.

The Court then quoted a passage from the judgment of Frankfurter, J. in *Wolf v. Colorado*³ to the effect that the security of one's privacy against arbitrary intrusion by the police is basic to a free society and that the knock at the door, whether by day or by night, as a prelude to a search, without authority of law but solely on the authority of the police, did not need the commentary of recent history to be condemned as inconsistent with the conception of human rights enshrined in the history and the basic constitutional documents of English-speaking peoples. The Court then said that at Common Law every man's house is his castle and that embodies an abiding principle transcending mere protection of property rights and expounds a concept of 'personal liberty' which does not rest upon any element of feudalism or any theory of freedom which has ceased to exist. The Court ultimately came to the conclusion that Regulation 236(b) which authorised domiciliary visits was violative of Article 21 and "as there is no 'law' on the basis of which the same could be justified, it must be struck down as unconstitutional". The Court was of the view that the other provisions in Regulation 236 were not bad as no right of privacy has been guaranteed by the Constitution.

14. Subba Rao, J. writing for the minority, was of the opinion that the word 'liberty' in Article 21 was comprehensive enough to include privacy also. He said that although it is true our Constitution does not expressly declare a right to privacy as a fundamental right, but the right is an essential ingredient of personal liberty, that in the last resort, a person's house, where he lives with his family, is his 'castle', that nothing is more deleterious to a man's physical happiness and health than a calculated interference with his privacy and that all the acts of surveillance under Regulation 236 infringe the fundamental right of the petitioner under Article 21 of the Constitution. And, as regards Article 19(1)(d), he was of the view that that right also was violated. He said that the right under that sub-Article is not mere freedom to move without physical obstruction and observed that movement under the scrutinizing gaze of the policeman cannot be free movement, that the freedom of movement in clause (a) therefore must be a movement in a free country, i.e., in a country where he can do whatever he likes, speak to whomsoever he wants, meet people of his own choice without any apprehension, subject of course to the law of social control and that a person under the shadow of surveillance is certainly deprived of this freedom. He concluded by saying

3. (1949) 938 US 25.

that surveillance by domiciliary visits and other acts is an abridgment of the fundamental right guaranteed under Article 19(1)(d) and under Article 19(1)(a). He however did not specifically consider whether Regulation 236 could be justified as a reasonable restriction in public interest falling within Article 19(5).

15. It was submitted on behalf of the petitioner that right to privacy is itself a fundamental right and that that right is violated as Regulation 856 provides for domiciliary visits and other incursions into it. The question whether right to privacy is itself a fundamental right flowing from the other fundamental rights guaranteed to a citizen under Part III is not easy of solution.

16. In *Griswold v. Connecticut*⁴, a Connecticut statute made the use of contraceptives a criminal offence. The executive and medical directors of the Planned Parenthood League of Connecticut were convicted in the Circuit Court on a charge of having violated the statute as accessories by giving information, instruction and advice to married persons as to the means of preventing conception. The Appellate Division of the Circuit Court affirmed and its judgment was affirmed by the Supreme Court of Errors of Connecticut. On appeal, the Supreme Court of the United States reversed. In an opinion by Douglas, J., expressing the view of five members of the Court, it was held that the statute was invalid as an unconstitutional invasion of the right of privacy of married persons. He said that the right of freedom of speech and press includes not only the right to utter or to print, but also the right to distribute, the right to receive, the right to read and that without those peripheral rights the specific rights would be less secure and that likewise, the other specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance, that the various guarantees create zones of privacy, and that protection against all governmental invasion "of the sanctity of a man's home and the privacies of life" was fundamental. He further said that the inquiry is whether a right involved

is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions' and that 'privacy is a fundamental personal right, emanating from the totality of the constitutional scheme under which we (Americans) live'.

17. In his dissenting opinion, Mr. Justice Black berated the majority for discovering and applying a constitutional right to privacy. His reading of the Constitution failed to uncover any provision or provisions forbidding the passage of any law that might abridge the 'privacy' of individuals.

18. In *Jane Roe v. Henry Wade*⁵, an unmarried pregnant woman who wished to terminate her pregnancy by abortion instituted an action in the United States District Court for the Northern District of Texas, seeking a declaratory judgment that the Texas criminal abortion statutes, which prohibited abortions except with respect to those procured or attempted by medical advice for the purpose of saving the life of the mother, were unconstitutional. The Supreme Court said that although

4. 381 US 479, 510.

5. 410 US 113.

the Constitution of the U.S.A. does not explicitly mention any right of privacy, the United States Supreme Court recognizes that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution, and

that the roots of that right may be found in the First Amendment, in the Fourth and Fifth Amendments, in the penumbras of the Bill of Rights, in the Ninth Amendment, and in the concept of liberty guaranteed by the first section of the Fourteenth Amendment

and that the "right to privacy is not absolute".

19. The usual starting point in any discussion of the growth of legal concept of privacy, though not necessarily the correct one, is the famous article, "*The Right to Privacy*" by Charles Warren and Louis D. Brandeis⁶. What was truly creative in the article was their insistence that privacy, — the right to be let alone — was an interest that man should be able to assert directly and not derivatively from his efforts to protect other interests. To protect man's "involute personality" against the intrusive behaviour so increasingly evident in their time, Warren and Brandeis thought that the law should provide both a criminal and a private law remedy :

Once a civilization has made a distinction between the 'outer' and the 'inner' man, between the life of the soul and the life of the body, between the spiritual and the material, between the sacred and the profane, between the realm of God and the realm of Caesar, between Church and State, between rights inherent and inalienable and rights that are in the power of government to give and take away, between public and private, between society and solitude, it becomes impossible to avoid the idea of privacy by whatever name it may be called — the idea of 'private space' in which man may become and remain 'himself'.⁷

20. There can be no doubt that the makers of our Constitution wanted to ensure conditions favourable to the pursuit of happiness. They certainly realized as Brandeis, J. said in his dissent in *Olmsstead v. United States*⁸, the significance of man's spiritual nature, of his feelings and of his intellect and that only a part of the pain, pleasure, satisfaction of life can be found in material things and therefore they must be deemed to have conferred upon the individual as against the government a sphere where he should be let alone.

21. "The liberal individualist tradition has stressed, in particular, three personal ideals, to each of which corresponds a range of 'private affairs'. The first is the ideal of personal relations ; the second, the Lockean ideal of the politically free man in a minimally regulated society ; the third, the Kantian ideal of the morally autonomous man, acting on principles that he accepts as rational."⁹

22. There can be no doubt that privacy-dignity claims deserve to be examined with care and to be denied only when an important counter-vailing interest is shown to be superior. If the Court does find that a claimed right is entitled to protection as a fundamental privacy right,

6. See 4 HLR 193.

7. See "*Privacy and the Law: A Philosophical Prelude*" by Milton R. Konvitz in 31 *Law and Contemporary Problems* (1966), pp. 272, 273.

8. 277 US 438, 471.

9. See Benn, "*Privacy, Freedom and Respect for Persons*" in J. Pennock & J. Chapman, Eds., *Privacy, Nomos XIII*, 1, 15-16.

a law infringing it must satisfy the compelling State interest test. Then the question would be whether a State interest is of such paramount importance as would justify an infringement of the right. Obviously, if the enforcement of morality were held to be a compelling as well as a permissible State interest, the characterization of a claimed right as a fundamental privacy right would be of far less significance. The question whether enforcement of morality is a State interest sufficient to justify the infringement of a fundamental privacy right need not be considered for the purpose of this case and therefore we refuse to enter the controversial thicket whether enforcement of morality is a function of State.

23. Individual autonomy, perhaps the central concern of any system of limited government, is protected in part under our Constitution by explicit constitutional guarantees. In the application of the Constitution our contemplation cannot only be of what has been but what may be. Time works changes and brings into existence new conditions. Subtler and far reaching means of invading privacy will make it possible to be heard in the street what is whispered in the closet. Yet, too broad a definition of privacy raises serious questions about the propriety of judicial reliance on a right that is not explicit in the Constitution. Of course, privacy primarily concerns the individual. It therefore relates to and overlaps with the concept of liberty. The most serious advocate of privacy must confess that there are serious problems of defining the essence and scope of the right. Privacy interest in autonomy must also be placed in the context of other rights and values.

24. Any right to privacy must encompass and protect the personal intimacies of the home, the family, marriage, motherhood, procreation and child rearing. This catalogue approach to the question is obviously not as instructive as it does not give analytical picture of the distinctive characteristics of the right of privacy. Perhaps, the only suggestion that can be offered as unifying principle underlying the concept has been the assertion that a claimed right must be a fundamental right implicit in the concept of ordered liberty.

25. Rights and freedoms of citizens are set forth in the Constitution in order to guarantee that the individual, his personality and those things stamped with his personality shall be free from official interference except where a reasonable basis for intrusion exists. "Liberty against government" a phrase coined by Professor Corwin expresses this idea forcefully. In this sense, many of the fundamental rights of citizens can be described as contributing to the right to privacy.

26. As Ely says :

There is nothing to prevent one from using the word 'privacy' to mean the freedom to live one's life without governmental interference. But the Court obviously does not so use the term. Nor could it, for such a right is at stake in every case.¹⁰

27. There are two possible theories for protecting privacy of home. The first is that activities in the home harm others only to the extent that they cause offence resulting from the mere thought that individuals

10. See *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale LJ 920, 932.

might be engaging in such activities and that such 'harm' is not constitutionally protectible by the State. The second is that individuals need a place of sanctuary where they can be free from societal control. The importance of such a sanctuary is that individuals can drop the mask, desist for a while from projecting on the world the image they want to be accepted as themselves, an image that may reflect the values of their peers rather than the realities of their natures.¹¹

28. The right to privacy in any event will necessarily have to go through a process of case-by-case development. Therefore, even assuming that the right to personal liberty, the right to move freely throughout the territory of India and the freedom of speech create an independent right of privacy as an emanation from them which one can characterize as a fundamental right, we do not think that the right is absolute.

29. The European Convention on Human Rights, which came into force on September 3, 1953, represents a valiant attempt to tackle the new problem. Article 8 of the Convention is worth citing¹²:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.

30. Having reached this conclusion, we are satisfied that drastic inroads directly into the privacy and indirectly into the fundamental rights, of a citizen will be made if Regulations 855 and 856 were to be read widely. To interpret the rule in harmony with the Constitution is therefore necessary and canalisation of the powers vested in the police by the two regulations earlier read becomes necessary, if they are to be saved at all. Our founding fathers were thoroughly opposed to a Police Raj even as our history of the struggle for freedom has borne eloquent testimony to it. The relevant Articles of the Constitution we have adverted to earlier, behove us therefore to narrow down the scope for play of the two regulations. We proceed to give direction and restriction to the application of the said regulations with the caveat that if any action were taken beyond the boundaries so set, the citizen will be entitled to attack such action as unconstitutional and void.

31. Depending on the character and antecedents of the person subjected to surveillance as also the objects and the limitation under which surveillance is made, it cannot be said surveillance by domiciliary visits would always be unreasonable restriction upon the right of privacy. Assuming that the fundamental rights explicitly guaranteed to a citizen have penumbral zones and that the right to privacy is itself a fundamental right, that fundamental right must be subject to restriction on the basis of compelling public interest. As Regulation 856 has the force of law,

11. See 26 Stanford Law Rev. 1161, 1187.

12. See "Privacy and Human Rights", Ed. AH Robertson, p. 176.

it cannot be said that the fundamental right of the petitioner under Article 21 has been violated by the provisions contained in it: for, what is guaranteed under that Article is that no person shall be deprived of his life or personal liberty except by the procedure established by 'law'. We think that the procedure is reasonable having regard to the provisions of Regulations 853(c) and 857. Even if we hold that Article 19(1)(d) guarantees to a citizen a right to a privacy in his movement as an emanation from that Article and is itself a fundamental right, the question will arise whether Regulation 856 is a law imposing reasonable restriction in public interest on the freedom of movement falling within Article 19(5); or, even if it be assumed that Article 19(5) does not apply in terms, as the right to privacy of movement cannot be absolute, a law imposing reasonable restriction upon it for compelling interest of State must be upheld as valid.

32. Under clause (c) of Regulation 853, it is only persons who are suspected to be habitual criminals who will be subjected to domiciliary visits. Regulation 857 provides as follows:

A comparatively short period of surveillance, if effectively maintained, should suffice either to show that the suspicion of criminal livelihood was unfounded, or to furnish evidence justifying a criminal prosecution, or action under the security sections. District Superintendents and their assistants should go carefully through the histories of persons under surveillance during their inspections, and remove from the register the names of such as appear to be earning an honest livelihood. Their histories will thereupon be closed and surveillance discontinued. In the case of a person under surveillance who has been lost sight of and is still untraced, the name will continue on the register for as long as the District Superintendent considers necessary.

Surveillance is also confined to the limited class of citizens who are determined to lead a criminal life or whose antecedents would reasonably lead to the conclusion that they will lead such a life.

33. When there are two interpretations, one wide and unconstitutional, the other narrower but within constitutional bounds, this Court will read down the overflowing expressions to make them valid. So read, the two regulations are more restricted than Counsel for the petitioner sought to impress upon us. Regulation 855, in our view, empowers surveillance only of persons against whom reasonable materials exist to induce the opinion that they show 'a determination, to lead a life of crime' — crime in this context being confined to such as involve public peace or security only and if they are dangerous security risks. Mere convictions in criminal cases where nothing gravely imperilling safety of society cannot be regarded as warranting surveillance under this regulation. Similarly, domiciliary visits and picketing by the police should be reduced to the clearest cases of danger to community security and not routine follow-up at the end of a conviction or release from prison or at the whim of a police officer. In truth, legality apart, these regulations ill-accord with the essence of personal freedoms and the State will do well to revise these old police regulations verging perilously near unconstitutionality.

34. With these hopeful observations, we dismiss the writ petition.

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- a which shall consider them in their proper perspective and render its decision. We make it clear that we are not expressing any opinion on the merits of the case. The appeals are disposed of accordingly. Parties shall bear their respective costs.

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(BEFORE V.N. KHARE, C.J. AND S.B. SINHA AND
DR AR. LAKSHMANAN, JJ.)

- b SHARDA .. Appellant:
Versus
DHARMPAL .. Respondent.

Civil Appeal No. 5933 of 2000[†], decided on March 28, 2003

- c A. Hindu Marriage Act, 1955 — Ss. 13(1)(iii), 12(1)(b) and 5(ii)(b) — Application under, for divorce accompanied by application for a direction for medical examination of respondent — Power of matrimonial court in such a case, held, extends to issuance of such a direction — However, such power should be exercised only if the applicant has a strong prima facie case and there is sufficient material before the court — Further held, exercise of such discretion would be subject to supervisory jurisdiction of High Court under S. 115 CPC and Art. 227 — In the absence of an express provision in Hindu Marriage Act or any other law governing the field conferring such power on the matrimonial court, provisions of other laws including CPC, in respect of powers of court examined to reach the said conclusion — Further held, in case of respondent's refusal to comply with such a direction, the court can draw an adverse inference against the respondent — Civil Procedure Code, 1908, Ss. 151, 75(e), 115 and Or. 26 R. 10-A, Or. 32 R. 15 — Lunacy Act, 1912, S. 41 — Mental Health Act, 1987, Ss. 2(1), 51 and 52 — Evidence Act, 1872, S. 114 Ill. (g) — Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 — National Trust for Welfare with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999 — Universal Declaration on the Rights of Disabled Persons, 1975 — Constitution of India, Arts. 20 and 227 —
d (English) Family Law Reform Act, 1969, S. 20(1) (as amended in 1987) — (English) Family Law Reform (Amendment) Act, 1987, Ss. 22 and 23 — Divorce Act, 1869, S. 19(3) — Parsi Marriage and Divorce Act, 1936, S. 32(b) — Special Marriage Act, 1954, S. 27(1)(e) — Dissolution of Muslim Marriages Act, 1939, S. 2(vi)
e B. Hindu Marriage Act, 1955 — Ss. 13(1)(iii), 12(1)(b) and 5(ii)(b) — Application under, for divorce — Court's direction in such a case to the respondent to undergo medical examination, held, not violative of right to personal liberty under Art. 21 — Provisions in other Central Acts enabling subjecting the accused to medical or other tests noticed — Such power however, to be exercised only on applicant putting up a prima facie case — Motor Vehicles Act, 1988, Ss. 185, 202, 203 and 204 — Criminal Procedure
f
g

- h [†] From the Judgment and Order dated 17-11-1999 of the Rajasthan High Court in SBCRP No. 1414 of 1999

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Code, 1973, Ss. 53 and 54 — Identification of Prisoners Act, 1920, S. 3 — Penal Code, 1860, Ss. 269 and 270

C. Hindu Marriage Act, 1955 — S. 13(1)(iii) — Divorce — Degree and extent of mental disorder to justify a decree of divorce, held, is incurable unsoundness of mind of a kind that the other spouse cannot reasonably be expected to live with him or her — A few strong instances indicating short temper and erratic behaviour may not amount to suffering continuously or intermittently from unsoundness of mind — Divorce Act, 1869, S. 19(3) — Parsi Marriage and Divorce Act, 1936, S. 32(b) — Special Marriage Act, 1954, S. 27(1)(e) — Dissolution of Muslim Marriages Act, 1939, S. 2(vi)

D. Hindu Marriage Act, 1955 — S. 13(1)(iii) — Divorce — Application for — Requisite degree of mental disorder — Relevance of medical evidence regarding, and onus of proof of the existence of — Such evidence, held, relevant though not conclusive — Onus of proof, held, is on the applicant

E. Constitution of India — Art. 21 — Right to privacy — Development and scope of — Held, has been gradually developed under Art. 21 by Supreme Court and is not an absolute right — In case of conflict between fundamental rights of the two parties the court has to balance the competing rights — Words and phrases — “Personal liberty”

The parties herein were married in 1991 according to Hindu rites. In 1995, the respondent filed an application for divorce against the appellant under Sections 12(1)(b) and 13(1)(iii) of the Hindu Marriage Act, 1955 (for short “the Act”). He filed an application seeking directions for medical examination of the appellant. The appellant objected thereto inter alia on the ground that the court had no jurisdiction to pass such directions. The court allowed the application and directed the appellant to submit herself to the medical examination. After unsuccessfully approaching the High Court, she filed the instant appeal. On the basis of her pleadings, the Supreme Court formulated the following questions:

(A) Whether a matrimonial court has the power to direct a party to undergo medical examination?

(B) Whether passing of such an order would be in violation of Article 21 of the Constitution of India?

Moreover, the Supreme Court considered the consequences of the refusal of the party concerned to comply with such a direction.

Dismissing the appeal, the Supreme Court

Held :

Extent and nature of mental illness requisite for grant of divorce : Onus of proof

It is trite law that for the purpose of grant of a decree of divorce the petitioner must establish that unsoundness of mind of the respondent is incurable or his/her mental disorder is of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with his/her spouse. Medical testimony for arriving at such a finding although may not be imperative but undoubtedly would be of considerable assistance to the court. However, such medical testimony being the evidence of experts would not leave the court from the obligation of satisfying itself on the point in issue beyond reasonable doubt. Relevance of a medical evidence, therefore, cannot be disputed. (Para 11)

A disorder of thought, behaviour and mind leading to unsoundness of mind may give rise to a cause of action for filing an application under Section

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13(1)(iii) of the Act. The burden of proof of the existence of requisite degree of mental disorder is on the spouse making the claim on that state of fact. (Para 12)

- a The decisions of various courts in India including the Supreme Court lead to the conclusion that a decree for divorce in terms of Section 13(1)(iii) of the Act can be granted in the event the unsoundness of mind is held to be not curable. A party may behave strangely or oddly inappropriate and be progressive in deterioration in the level of work which may lead to a conclusion that he or she suffers from an illness of slow growing developing over the years. The disease, however, must be of such a kind that the other spouse cannot reasonably be expected to live with him or her. A few strong instances indicating short temper and somewhat erratic behaviour on the part of the spouse may not amount to his/her suffering continuously or intermittently from mental disorder. (Para 13)

Ram Narain Gupta v. Rameshwari Gupta, (1988) 4 SCC 247 : AIR 1988 SC 2260, *relied on*

- c Section 2(l) of the Mental Health Act, 1987 defines "mentally ill person". Mental disorder may further be of varying degree. The court has power to issue appropriate direction for protection of human rights of mentally ill persons and to see to it that a person suffering from mental illness gets adequate protection in terms of the Mental Health Act. (Paras 14 and 29)

(A) *Power of the court to direct a party to undergo medical examination*

- d The Hindu Marriage Act or any other law governing the field does not contain any express provision empowering the court to issue a direction upon a party to a matrimonial proceedings to compel him to submit himself to a medical examination. However, that does not preclude a court from passing such an order. (Para 17)

S. v. S., *W. v. Official Solicitor*, 1972 AC 24 : (1970) 3 All ER 107 : (1970) 3 WLR 366 (HL); *W. v. W.*, (1963) 2 All ER 841 : 1964 P 67 : (1963) 3 WLR 540 (CA); *B.R.B. v. J.B.*, (1968) 2 All ER 1023 (CA); *M.B. (an adult: medical treatment)*, *In re*, (1997) 2 PCR 541 : 38 BMLR 175 (CA); *St. George's Healthcare N.H.S. Trust v. S. and R. v. Collins*, *ex p S.*, (1998) 3 WLR 936 : (1998) 3 All ER 673 (CA); *Costello-Roberts v. United Kingdom*, (1995) 19 EHRR 112, *considered*

- e *Human Rights Law and Practice*; *Wigmore on Evidence*, Vol. VIII, 3rd Edn.; *Phipson on Evidence*, 14th Edn., *referred to*

- f The court, however, indisputably is empowered to satisfy itself as to whether a party before it suffers from mental illness or not either for the purpose of appointment of a guardian in terms of Order 32 Rule 15 CPC or Section 41 of the Lunacy Act as also for the determination of his competence as a witness. (Paras 27, 28 and 50)

Halsbury's Laws of England (4th Edn.), Vols. 11 and 17, *referred to*

- g The primary duty of a court is to see that truth is arrived at. A party to a civil litigation, it is axiomatic, is not entitled to protection under Article 20. Thus, the civil court although may not have any specific provisions in the Code of Civil Procedure and the Evidence Act, has an inherent power in terms of Section 151 CPC to pass all orders for doing complete justice to the parties to the suit. Discretionary power under Section 151 CPC, it is trite, can be exercised also on an application filed by the party. (Paras 32 and 33)

- h In certain cases medical examination by the experts in the field may not only be found to be leading to the truth of the matter but may also lead to removal of misunderstanding between the parties. It may bring the parties to terms. (Para 34)

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Having regard to development in medicinal technology, it is possible to find out that what was presumed to be a mental disorder of a spouse is not really so. In matrimonial disputes, the court has also a conciliatory role to play — even for the said purpose it may require expert advice. Under Section 75(e) and Order 26 Rule 10-A CPC the civil court has the requisite power to issue a direction to hold a scientific, technical or expert investigation. (Paras 35 to 37)

Goutam Kundu v. State of W.B., (1993) 3 SCC 418 : 1993 SCC (Cri) 928 : AIR 1993 SC 2295; *Ninganma v. Chikkaiah*, AIR 2000 Kant 50 : (2000) 1 Kant LJ 281, *distinguished*

Bipinchandra Shantilal Bhatt v. Madhuriben Bhatt, AIR 1963 Guj 250 : (1963) 4 Guj LR 890, *considered*

Revanma v. Shanthappa, AIR 1972 Mys 157 : (1972) 1 Mys LJ 136, *overruled*

Shanti Devi v. Ram Nath, AIR 1972 P&H 270; *P.A. Anbu Anandan v. Sivakumari*, AIR 1999 Mad 232, *impliedly distinguished*

A.S. Mohd. Ibrahim Unnal v. Sk. Mohd. Marakayar, AIR 1949 Mad 292 : (1948) 2 MLJ 277; *Pulavarthi Sreeramamurthi v. Pulavarthi Lakshmikantham*, AIR 1955 AP 207;

Briggs v. Morgan, (1820) 3 Phill Ecc 325 : 161 ER 1339; *George Swamidoss Joseph v. Sundari Edward*, (1954) 67 Mad LW 676 : AIR 1955 NUC Mad 3904, *referred to*

Birendra Kumar Biswas v. Hemlata Biswas, AIR 1921 Cal 459 : ILR 48 Cal 283; *G. Venkatanarayana v. Kurupati Laxmi Devi*, AIR 1985 AP 1, *impliedly approved*

Norton v. Seton, (1819) 3 Phill Ecc 147 : 161 ER 1283; *Pollard v. Wybourn*, (1828) 1 Hag Ecc 725 : 162 ER 732; *Aleson v. Aleson*, (1728) 2 Lec App 576 : 161 ER 445; *Sparrow v. Harrison*, (1841) 3 Curt 16 : 163 ER 638; *Harrison v. Harrison*, (1842) 4 Moo PC 96 : 13 ER 238; *F. v. P.*, (1896) 75 LT 192; *B. v. B.*, (1901) P 39 : 70 LJ P 4; *W. v. S.*, (1905) P 231 : 93 LT 456, *relied on*

The question as to whether a person is mentally ill or not although may be a subject-matter of litigation, the court having regard to the provisions contained in Order 32 Rule 15 CPC, Section 41, Lunacy Act as also for the purpose of judging his competence to examine as a witness may issue requisite directions. It is, therefore, not correct to contend that for the said purposes the court has no power at all. The prime concern of the court is to find out as to whether a person who is said to be mentally ill could defend himself properly or not. Determination of such an issue although may have some relevance with the determination of the issue in the lis, nonetheless, the court cannot be said to be wholly powerless in this behalf. Furthermore, it is one thing to say that a person would be subjected to a test which would invade his right of privacy and may in some case amount to battery; but it is another thing to say that a party may be asked to submit himself to a psychiatrist or a psychoanalyst so as to enable the court to arrive at a just conclusion. Whether the party to the marriage requires a treatment or not can be found out only in the event, he is examined by a properly qualified psychiatrist. For the said purpose, it may not be necessary to submit himself to any blood test or other pathological tests. (Para 50)

If the court for the purpose envisaged under Order 32 Rule 15 CPC or Section 41, Lunacy Act can do it suo motu, there is no reason why it cannot do so on an application filed by a party to the marriage. Even otherwise the court may issue an appropriate direction so as to satisfy itself as to whether apart from treatment he requires adequate protection inter alia by way of legal aid so that he may not be subject to an unjust order because of his incapacity. Keeping in view of the fact that in a case of mental illness the court has adequate power to examine the party or get him examined by a qualified doctor, it is has to be held

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that in an appropriate case the court may take recourse to such a procedure even at the instance of the party to the lis. (Paras 51 and 52)

- a Furthermore, the court must be held to have the requisite power even under Section 151 CPC to issue such direction either suo motu or otherwise which, according to it, would lead to the truth. (Para 53)

(B) Would subjecting a person to a medical test be in violation of Article 21?

The right to privacy has been developed by the Supreme Court over a period of time. With the expansive interpretation of the phrase "personal liberty", this right has been read into Article 21. (Paras 54 and 56)

- b *M.P. Sharma v. Satish Chandra*, AIR 1954 SC 300 : 1954 Cri LJ 865; *Kharak Singh v. State of U.P.*, AIR 1963 SC 1295 : (1963) 2 Cri LJ 329; *R. Rajagopal v. State of T.N.*, (1994) 6 SCC 632 : AIR 1995 SC 264; *People's Union for Civil Liberties v. Union of India*, (1997) 1 SCC 301, referred to

But the right to privacy in terms of Article 21 of the Constitution is not an absolute right. If there were a conflict between fundamental rights of two parties, that right which advances public morality would prevail. (Paras 57 and 59)

- c *Gobind v. State of M.P.*, (1975) 2 SCC 148 : 1975 SCC (Cri) 468 : AIR 1975 SC 1378; '*X*' v. *Hospital 'Z'*, (1998) 8 SCC 296; '*X*' v. *Hospital 'Z'*, (2003) 1 SCC 500, relied on
R. Rajagopal v. State of T.N., (1994) 6 SCC 632 : AIR 1995 SC 264, referred to

- d Certain laws have been enacted by the Indian Parliament where the accused may be subjected to certain medical or other tests. By way of example, one may refer to Sections 185, 202, 203, 204 of the Motor Vehicles Act, Sections 53 and 54 CrPC and Section 3 of the Identification of Prisoners Act, 1920. Reference in this connection may also be made to Sections 269 and 270 IPC. Constitutionality of these laws, if challenge is thrown, may be upheld. (Para 62)

- e In all such matrimonial cases where divorce is sought, say on the ground of impotency, schizophrenia etc. normally without medical examination, it would be difficult to arrive at a conclusion as to whether the allegation is correct or not. In order to substantiate such allegation, the petitioner would always insist on medical examination. If the respondent avoids such medical examination on the ground that it violates his/her right to privacy or for that matter right to personal liberty as enshrined under Article 21, then it may in most of such cases become impossible to arrive at a conclusion. It may render the very grounds on which divorce is permissible nugatory. Therefore, when there is no right to privacy specifically conferred by Article 21 and with the extensive interpretation of the phrase "personal liberty" this right has been read into Article 21, it cannot be treated as an absolute right. What is emphasized is that some limitations on this right have to be imposed and particularly where two competing interests clash. In matters of the said nature where the legislature has conferred a right upon his spouse to seek divorce on such grounds, it would be the right of that spouse which comes in conflict with the so-called right to privacy of the respondent.
- f Thus the court has to reconcile these competing interests by balancing the interests involved. (Para 76)

- g If for arriving at the satisfaction of the court and to protect the right of a party to the lis who may otherwise be found to be incapable of protecting his own interest, the court passes an appropriate order, the question of such action being violative of Article 21 would not arise. The court having regard to Article 21 must also see to it that the right of a person to defend himself must be adequately protected. (Para 77)
- h

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However, a court shall not order a roving inquiry. It must have sufficient materials before it to enable it to exercise its discretion. Exercise of such discretion would be subject to the supervisory jurisdiction of the High Court in terms of Section 115 CPC and/or Article 227. Abuse of the discretionary power at the hands of a court is not expected. The court must arrive at a finding that the applicant has established a strong prima facie case before passing such an order.

(Para 78)

If despite an order passed by the court, a person refuses to submit himself to such medical examination, a strong case for drawing an adverse inference would be made out. Section 114 of the Evidence Act also enables a court to draw an adverse inference if the party does not produce the relevant evidences in his power and possession.

(Para 79)

So viewed, the implicit power of a court to direct medical examination of a party to a matrimonial litigation in a case of this nature cannot be held to be violative of one's right of privacy.

(Para 80)

To sum up, our conclusions are:

1. A matrimonial court has the power to order a person to undergo medical test.

2. Passing of such an order by the court would not be in violation of the right to personal liberty under Article 21.

3. However, the court should exercise such a power if the applicant has a strong prima facie case and there is sufficient material before the court. If despite the order of the court, the respondent refuses to submit himself to medical examination, the court will be entitled to draw an adverse inference against him.

(Para 81)

M. Vijaya v. Chairman and Managing Director, Singareni Collieries Co. Ltd., AIR 2001 AP 502 (FB), impliedly approved

R (on the application of S) v. Chief Constable of South Yorkshire, (2003) 1 All ER 148 (CA); *Armando Schmeiber v. State of California*, 384 US 757 : 16 L Ed 2d 908 (1966); *Paul H. Breithaupt v. Morris Abram*, 352 US 432 : 1 L Ed 2d 448 (1957); *State of Bombay v. Kathi Kalu Oghad*, AIR 1961 SC 1808 : (1961) 2 Cri LJ 856; *State (Delhi Admn.) v. Gulzari Lal Tandon*, (1979) 3 SCC 316 : 1979 SCC (Cri) 526 : AIR 1979 SC 1382; *Matthew R., Re*, 113 Mo App 701, 715, 688 A 2d 955, 961; *Zuniga v. Pierce*, 714 F 2d 632 (1983); *Laznovsky v. Laznovsky*, 74.5 A 2d 1054 (Md Ct App 2000), relied on

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N. Venkatachalapathy v. Saroja, AIR 1981 Mad 349 : (1981) 1 MLJ 440, referred to

Halsbury's Laws of England, 4th Edn., Reissue, Vol. 8(2), paras 149 & 164; *Encyclopaedia of the American Constitution*, Vol. 6, p. 2677; Scott Barry: *AIDS Law Today*, referred to

H-M/ATZ/27948/C

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Ms Nanita Sharma and Vivek Sharma, Advocates, for the Respondent.

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- f 29. AIR 1961 SC 1808 : (1961) 2 Cri LJ 856, *State of Bombay v. Kathi Kalu Oghad* 520d
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The Judgment of the Court was delivered by

S.B. SINHA, J.— Whether a party to a divorce proceeding can be compelled to a medical examination is the core question involved in this appeal. This question arises out of a judgment dated 17-11-1999 passed by the High Court of Judicature for Rajasthan at Jodhpur in SB Civil Revision Petition No. 1414 of 1999 dismissing an application filed by the appellant herein questioning an order of the Additional District and Sessions Judge No. 1, Hanumangarh Camp, Sangaria dated 8-10-1999 directing to submit herself to medical examination on the question as to whether she is of unsound mind.

2. The parties herein were married on 26-6-1991 according to Hindu rites. On or about 3-6-1995, the respondent filed an application for divorce against the appellant under Sections 12(1)(b) and 13(1)(iii) of the Hindu Marriage Act, 1955. He filed an application seeking directions for medical examination of the appellant on 5-5-1999. The appellant objected thereto inter alia on the ground that the court had no jurisdiction to pass such directions. By an order dated 8-10-1999 the said application was allowed directing the appellant to submit herself to the medical examination. Aggrieved by the said order, she filed a revision petition before the High Court which was dismissed by the impugned judgment.

3. Mr Kaushik, the learned counsel appearing on behalf of the appellant herein has principally raised two contentions in support of this appeal. *Firstly*, compelling a person to undergo a medical examination by an order of the court would be violative of the right to “personal liberty” guaranteed under Article 21 of the Constitution of India. *Secondly*, in absence of a specific empowering provision, a court dealing with matrimonial cases cannot subject a party to the lis to undergo medical examination against his/her volition. In the event, if a party does not undergo such medical examination, the court may merely draw an adverse inference.

4. The learned counsel in support of his aforementioned contentions relied upon *Bipinchandra Shantilal Bhatt v. Madhuriben Bhatt*¹, *Revamma v. Shanthappa*², *Shanti Devi v. Ram Nath*³, *N. Venkatachalapathy v. Saroja*⁴,

1 AIR 1963 Guj 250 : (1963) 4 Guj LR 890

2 AIR 1972 Mys 157 : (1972) 1 Mys LJ 136

3 AIR 1972 P&H 270

4 AIR 1981 Mad 349 : (1981) 1 MLJ 440

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*Goutam Kundu v. State of W.B.*⁵, *P.A. Anbu Anandan v. Sivakumari*⁶ and *Ningamma v. Chikkaiah*⁷.

- a 5. Ms Nanita Sharma, the learned counsel appearing on behalf of the respondent submitted that a matrimonial court is required to arrive at a finding as to whether the appellant herein had been suffering from unsoundness of mind, mental disorder or insanity by virtue of the provisions contained in Section 5, Section 12(1) and Section 13(1) of the Hindu Marriage Act, 1955. As such a state of mind of a party to the marriage may
b render the marriage voidable, the court is entitled to take the expert's opinion in this behalf so as to enable it to satisfy itself as regard the existence of the conditions for grant of a decree for divorce.

6. The learned counsel further contended that the exposure to medical examination aided by scientific data would not infringe the right to personal liberty under Article 21 of the Constitution of India.

- c 7. In support of the said contentions the learned counsel relied upon *G. Venkatanarayana v. Kurupati Laxmi Devi*⁸, *Birendra Kumar Biswas v. Hemlata Biswas*⁹, *George Swamidoss Joseph v. Sundari Edward*¹⁰ and *A.S. Mohd. Ibrahim Ummal v. Sk. Mohd. Marakayar*¹¹.

- d 8. The relevant statutory provisions of the Hindu Marriage Act, 1955 [Sections 5, 12(1)(b) and 13(1)(iii)] for adjudication of this case are outlined as follows:

"5. *Conditions for a Hindu marriage.*—A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled, namely—

- (i) neither party has a spouse living at the time of the marriage;
(ii) at the time of the marriage, neither party—
e (a) is incapable of giving a valid consent to it in consequence of unsoundness of mind; or
(b) though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or
(c) has been subject to recurrent attacks of insanity;
f (iii)-(v) * * *

12. *Voidable marriages.*—(1) Any marriage solemnized, whether before or after the commencement of this Act, shall be voidable and may be annulled by a decree of nullity on any of the following grounds, namely,—

- (a) * * *

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5 (1993) 3 SCC 418 : 1993 SCC (Cri) 928 : AIR 1993 SC 2295

6 AIR 1999 Mad 232

7 AIR 2000 Kant 50 : (2000) 1 Kant LJ 281

8 AIR 1985 AP 1

9 AIR 1921 Cal 459 : ILR 48 Cal 283

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10 (1954) 67 Mad LW 676 : AIR 1955 NUC Mad 3904

11 AIR 1949 Mad 292 : (1948) 2 MLJ 277

(b) that the marriage is in contravention of the condition specified in clause (ii) of Section 5;

13. *Divorce*.—(1) Any marriage solemnized, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party—

(i)-(ii)

(iii) has been incurably of unsound mind, or has been suffering continuously or intermittently from mental disorder of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent.

Explanation.—In this clause,—

(a) the expression ‘mental disorder’ means mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of mind and includes schizophrenia;

(b) the expression ‘psychopathic disorder’ means a persistent disorder or disability of mind (whether or not including subnormality of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the other party, and whether or not it requires or is susceptible to medical treatment; or”

9. Clause (ii)(b) of Section 5 provides for one of the conditions for a valid Hindu marriage that neither party must be suffering from unsoundness of mind, mental disorder or insanity. In terms of Section 12(1)(b) of the Act a marriage may be held to be voidable if the other party was suffering from mental disorder or insanity. Section 13(1)(iii) of the Act provides that a party to the marriage may present a petition for dissolution of marriage by a decree of divorce inter alia on the ground that the other party has been incurably of unsound mind and has been suffering continuously or intermittently from mental disorder of such a kind that the petitioner cannot reasonably be expected to live with the respondent. It is beyond any cavil that a marriage in contravention of the aforementioned provisions of the Hindu Marriage Act is per se not void but is merely voidable.

Issues for consideration

10. The following issues arise for consideration in the present case:

(A) Whether a matrimonial court has the power to direct a party to undergo medical examination?

(B) Whether passing of such an order would be in violation of Article 21 of the Constitution of India?

(A) Power of the court to direct a party to undergo medical examination

11. It is trite law that for the purpose of grant of a decree of divorce what is necessary is that the petitioner must establish that unsoundness of mind of the respondent is incurable or his/her mental disorder is of such a kind and to such an extent that he cannot reasonably be expected to live with his/her spouse. Medical testimony for arriving at such finding although may not be imperative but undoubtedly would be of considerable assistance to the court.

a We may, however, hasten to add that such medical testimony being the evidence of experts would not leave the court from the obligation of satisfying itself on the point in issue beyond reasonable doubt. Relevance of medical evidence, therefore, cannot be disputed.

b 12. A sound mind indisputably is a key to a happy married life. A party to the marriage must, thus, have normal and sound mind so as to live a happy marital life. A disorder of thought, behaviour and mind leading to unsoundness of mind may give rise to a cause of action for filing an application under Section 13(1)(iii) of the Hindu Marriage Act. The burden of proof of the existence of requisite degree of mental disorder is on the spouse making the claim on that state of fact.

c 13. The decisions rendered by various courts of this country including this Court lead to a conclusion that a decree for divorce in terms of Section 13(1)(iii) of the Act can be granted in the event the unsoundness of mind is held to be not curable. A party may behave strangely or oddly inappropriate and progressive in deterioration in the level of work may lead to a conclusion that he or she suffers from an illness of slow growing developing over the years. The disease, however, must be of such a kind that the other spouse cannot reasonably be expected to live with him or her. A few strong instances indicating a short temper and somewhat erratic behaviour on the part of the spouse may not amount to his/her suffering continuously or intermittently from mental disorder.

d 14. It may be noticed that Section 2(l) of the Mental Health Act, 1987 defines "mentally ill person" to mean a person who is in need of treatment by reason of any mental disorder other than mental retardation. Mental disorder may further be of varying degree.

e 15. This Court in *Ram Narain Gupta v. Rameshwari Gupta*¹² while considering a question as to whether a party to the marriage was suffering from schizophrenia observed: (SCC pp. 258-59, paras 31-33)

"[4/31]. Indeed the caution of a learned author against too readily giving a name to a thing is worth recalling:

f 'Giving something a name seems to have a deadening influence upon all our relations to it. It brings matters to a finality. Nothing further seems to need to be done. The disease has been identified. The necessity for further understanding of it has ceased to exist.'

g [32]. It is precisely for this reason that a learned authority on mental health saw wisdom in eschewing the mere choice of words and the hollowness they would bring with them. He said:

h 'I do not use the word "schizophrenia" because I do not think any such disease exists.... I know it means widely different things to different people. With a number of other psychiatrists, I hold that the words "neurosis", "psychoneurosis", "psychopathic personality", and the like, are similarly valueless. I do not use them, and I try to

prevent my students from using them, although the latter effort is almost futile once the psychiatrist discovers how conveniently ambiguous these terms really are....

In general, we hold that mental illness should be thought and spoken of less in terms of disease entities than in terms of personality disorganization. We can precisely define organization and disorganization; we cannot precisely define disease....

Of course, one can describe a "manic" or a "depressed" or a "schizophrenic" constellation of symptoms, but what is most important about this constellation in each case? Not, we think, its curious external form, but rather what it indicates in regard to the process of disorganization and reorganization of a personality which is in a fluctuant state of attempted adjustment to environmental reality. Is the imbalance increasing or decreasing? To what is the stress related? What psychological factors are accessible to external modification? What latent capacities for satisfaction in work, play, love, creativity, are discoverable for therapeutic planning? And this is language that can be understood. It is practical language and not language of incantation and exorcism.

15[33]. This medical concern against too readily reducing a human being into a functional non-entity and as a negative unit in family or society is law's concern also and is reflected, at least partially, in the requirements of Section 13(1)(iii). In the last analysis, the mere branding of a person as schizophrenic will not suffice. For purposes of Section 13(1)(iii) 'schizophrenia' is what schizophrenia does."

16. Having regard to the complexity of the situation, the doctor's opinion may be of utmost importance for granting or rejecting a prayer for a decree of divorce. The question is as to whether a mental disorder is curable can be the subject-matter of determination of by a court of law having regard to the expert medical opinion and particularly the ongoing development in the scientific and medical research in this direction.

17. The Hindu Marriage Act or any other law governing the field do not contain any express provision empowering the court to issue a direction upon a party to a matrimonial proceedings to compel him to submit himself to a medical examination. However, in our opinion, this does not preclude a court from passing such an order. We may, however, notice that such provisions have expressly been inserted in England by way of Sections 22 and 23 of the Family Law Reform (Amendment) Act, 1987 on the recommendations of the Law Commission. Section 23 is to the following terms:

"23. *Provisions as to scientific tests.*—(1) For sub-sections (1) and (2) of Section 20 of the Family Law Reform Act, 1969 (power of court to require use of blood tests), there shall be substituted the following sub-sections—

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(1) In any civil proceedings in which the parentage of any person falls to be determined, the court may, either of its own motion or on an application by any party to the proceedings, give a direction—

(a) for the use of scientific tests to ascertain whether such tests show that a party to the proceedings is or is not the father or mother of that person; and

(b) for the taking, within a period specified in the direction, of bodily samples from all or any of the following, namely, that person, any party who is alleged to be the father or mother of that person and any other party to the proceedings;

and the court may at any time revoke or vary a direction previously given by it under this sub-section.”

18. The English courts at one point of time held that the court had no power to order a blood test on the ground that it would be a battery which no court may authorize. (See *S. v. S.*, *W. v. Official Solicitor*¹³ and *W. v. W.*¹⁴)

19. However, the court has been empowered to issue such a direction in a civil litigation.

20. In *B.R.B. v. J.B.*¹⁵ it was held: (All ER p. 1025 I)

A Judge of the High Court has power to order a blood test whenever it is in the best interest of the child. The Judges can be trusted to exercise this discretion wisely. No limit-condition or bound is set up to the way in which Judges exercise their discretion. The object of the court always is to find out the truth. When scientific advances give fresh means of ascertaining it, there should not be any hesitations to use those means whenever the occasion requires.

21. As regard cases involving capacity as given in *M.B. (an adult: medical treatment)*, *In re*¹⁶ when surgical or invasive treatment may be needed by a patient, certain guidelines had been enumerated in *St. George's Healthcare N.H.S. Trust v. S. and R. v. Collins, ex p S.*¹⁷ These guidelines are:

“(i) They have no application where the patient is competent to accept or refuse treatment. In principle a patient may remain competent notwithstanding detention under the Mental Health Act, 1983.

“(ii) If the patient is competent and refuses consent to the treatment, an application to the High Court for a declaration would be pointless. In this situation the advice given to the patient should be recorded. For their own protection hospital authorities should seek unequivocal assurances from the patient (to be recorded in writing) that the refusal represents an informed decision, that is, that she understands the nature of and reasons for the proposed treatment, and the risks and likely prognosis involved in the decision to refuse or accept it. If the patient is unwilling to sign a

13 1972 AC 24 : (1970) 3 All ER 107 : (1970) 3 WLR 366 (HL)

14 (1963) 2 All ER 841 : 1964 P 67 : (1963) 3 WLR 540 (CA)

15 (1968) 2 All ER 1023 (CA)

16 (1997) 2 FCR 541 : 38 BMLR 175 (CA)

17 (1998) 3 WLR 936 : (1998) 3 All ER 673 (CA)

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written indication of this refusal, this too should be noted in writing. Such a written indication is merely a record for evidential purposes. It should not be confused with or regarded as a disclaimer. a

(iii) If the patient is incapable of giving or refusing consent, either in the long term or temporarily (e.g. due to unconsciousness), the patient must be cared for according to the authority's judgment of the patient's best interests. Where the patient has given an advance directive, before becoming incapable, treatment and care should normally be subject to the advance directive. However, if there is reason to doubt the reliability of the advance directive (for example, it may sensibly be thought not to apply to the circumstances which have arisen), then an application for a declaration may be made." b

22. Although individuals have the right not to be subjected to compulsory physical interventions and treatments but every measure adversely affecting a person's physical and moral integrity necessarily does not involve an interference with respect to his private life. (*Costello-Roberts v. United Kingdom*¹⁸.) [See *Human Rights Law and Practice*, Chapter 4 — The European Convention on Human Rights, Article 8: Right to Respect for Private and Family Life, p. 165 at 169.] c

23. In *Wigmore on Evidence*, Vol. VIII, 3rd Edn., it has been observed: d

"The courts can as well command a witness to let the jury, or qualified experts, inspect his premises, his chambers, or his person, as to produce his documents. It is not to be supposed that our courts will finally commit themselves to the denial of such a plain dictate of principle and of common sense."

24. It has been further observed: e

"(c) As to a witness' living body, whether by self-exhibition to the jury at the trial, or by inspection of experts out of court, there is ample authority denying any privilege of non-disclosure; the trial court's discretion determining the necessity and the suitable conditions. But some courts still decline to take this liberal view, even in cases where this form of evidence is most necessary, as on a charge of rape or of slander of chastity. It is astonishing that courts are so tardy in ignoring the propriety of getting at the truth by direct and simple methods, especially when modern science can here be of such peculiar assistance. Notable examples of the vital necessity of here resorting to modern scientific methods are seen in the inquiry into paternity by blood group examination and into the credibility of a woman complainant in sex crimes by psychiatric examination. f

Whether a person under arrest (not a witness) may be measured, photographed, or physically examined, is considered post, under the privilege against self-crimination." g

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25. In *Phipson on Evidence*, 14th Edn., it is stated:

a "9.01. Competence is to be distinguished from compellability. A person may be admitted to give evidence, though in certain cases he will not be compelled by the court to do so. In general, all persons are both competent and compellable. A person, however, though competent and compellable as a witness may not be competent or may not be compellable to give evidence as to particular matters."

It has been further stated:

b "1.13. *Detention, preservation, inspection, samples, photographs, experiments.*—... A report by a court expert may be ordered under Order 40 Rule 1, and this may involve experiments and tests. In patent actions this power is given by Order 103 Rule 27, but there is a discretion, and the court will not make an order for an inspection for what may be nothing more than a 'fishing' inspection; in arbitrations by the Arbitration Act, 1950, Section 12(6); in references by Order 36, and in Country Court cases by CC Rules, 1981, Order 19 and Order 21 Rule 6 (an inspection of a lady's mouth by a dentist was, however, refused under these Rules as not being 'any property or thing the subject-matter of the action'). Nonetheless, medical inspection of a party may be ordered in various cases e.g. in Chancery to determine pregnancy; in nullity suits on the ground of impotence, and refusal to submit is evidence against the party; though bankrupts cannot be compulsorily examined with a view to their life insurance. A plaintiff in a personal injury action is liable to have his action stayed unless he submits to a medical examination on behalf of the defendant. Moreover, the court will not lightly order an examination which is unpleasant, painful or potentially dangerous. Since 1974, the court has had power to order that the parties exchange accounts of the substance of any oral or documentary expert medical evidence as a condition precedent to allowing the expert's report to be given at all. These two rules substantially nullify the common law privilege, which prevented the court from ordering the exchange of medical reports. The privilege still exists and will be of importance in relation to evidence obtained but, because unfavourable, not intended to be used or where the court exercises its discretion against disclosure. So, scientific experiments may be ordered, artistic tests undertaken, or specimens of handwriting brought into being, in or out of court, during the trial. Regulations may be made under the National Insurance (Industrial Injuries) Act, 1965, Section 50, providing for examination and report on any questions arising for decision under the Act."

g 26. In the event a court of law may find a person as disabled either physically or mentally, an appropriate direction for his rehabilitation having regard to the Universal Declaration on the Rights of Disabled Persons, 1975, provisions of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, the National Trust for Welfare

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with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999 and other statutes, may be issued.

27. The court, however, indisputably is empowered to satisfy itself as to whether a party before it suffers from mental illness or not either for the purpose of appointment of a guardian in terms of Order 32 Rule 15 of the Code of Civil Procedure or Section 41 of the Indian Lunacy Act as also for the determination of his competence as a witness. a

28. Order 32 Rule 15 of the Code of Civil Procedure and Section 41 of the Indian Lunacy Act read thus: b

"15. Rules 1 to 14 (except Rule 2-A) to apply to persons of unsound mind.—Rules 1 to 14 (except Rule 2-A) shall, so far as may be, apply to persons adjudged, before or during the pendency of the suit, to be of unsound mind and shall also apply to persons who, though not so adjudged, are found by the court on enquiry to be incapable, by reason of any mental infirmity, of protecting their interest when suing or being sued." c

"41. Powers of court in respect of attendance and examination of lunatic.—(1) The court may require the alleged lunatic to attend at such convenient time and place as it may appoint for the purpose of being personally examined by the court, or by any person from whom the court may desire to have a report of the mental capacity and condition of such alleged lunatic." d

(2) The court may likewise make an order authorizing any person or persons therein named to have access to the alleged lunatic for the purpose of a personal examination."

29. It will also be relevant to note that the court has power to issue appropriate direction for protection of human rights of mentally ill persons and to see to it that a person suffering from mental illness gets adequate protection in terms of the Mental Health Act. e

30. In *Halsbury's Laws of England*, Vol. 11, 4th Edn., it has been noticed that the mentally retarded persons are incompetent to give evidence. However, it is stated:

"A person of unsound mind may give evidence if the trial Judge is satisfied that he is then of sufficient understanding to give rational evidence; his suffering from delusions does not render him incompetent." f

31. In *Halsbury's Laws of England*, Vol. 17, 4th Edn., the Judge's duty in this behalf has been summarised by stating:

"232. Judge's duty.—Questions as to the competency or incompetency of a witness are decided by the Judge, generally on a preliminary examination called the voir dire; but if the incompetency of a witness is not discovered until after he is sworn and has given evidence, his evidence may nonetheless be objected to and rejected." g

32. Yet again the primary duty of a court is to see that truth is arrived at. A party to a civil litigation, it is axiomatic, is not entitled to constitutional protections under Article 20 of the Constitution of India. Thus, the civil court although may not have any specific provisions in the Code of Civil Procedure and the Evidence Act, has an inherent power in terms of Section 151 of the h

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Code of Civil Procedure to pass all orders for doing complete justice to the parties to the suit.

a 33. Discretionary power under Section 151 of the Code of Civil Procedure, it is trite, can be exercised also on an application filed by the party.

b 34. In certain cases medical examination by the experts in the field may not only be found to be leading to the truth of the matter but may also lead to removal of misunderstanding between the parties. It may bring the parties to terms.

35. Having regard to development in medicinal technology, it is possible to find out that what was presumed to be a mental disorder of a spouse is not really so.

c 36. In matrimonial disputes, the court has also a conciliatory role to play — even for the said purpose it may require expert advice.

d 37. Under Section 75(e) of the Code of Civil Procedure and Order 26 Rule 10-A the civil court has the requisite power to issue a direction to hold a scientific, technical or expert investigation.

e 38. In *Goutam Kundu v. State of W.B.*⁵ this Court while dealing with a question about the paternity of a child noticed the provisions of Section 112 of the Evidence Act and held that the presumption arising thereunder can only be displaced by a strong preponderance of evidence and not by a mere balance of probabilities. It was held: (SCC p. 428, para 26)

“26. From the above discussion it emerges—

(1) that courts in India cannot order blood test as a matter of course;

e (2) wherever applications are made for such prayers in order to have roving inquiry, the prayer for blood test cannot be entertained.

(3) There must be a strong prima facie case in that the husband must establish non-access in order to dispel the presumption arising under Section 112 of the Evidence Act.

f (4) The court must carefully examine as to what would be the consequence of ordering the blood test; whether it will have the effect of branding a child as a bastard and the mother as an unchaste woman.

(5) No one can be compelled to give sample of blood for analysis.”

g 39. *Goutam Kundu*⁵ is, therefore, not an authority for the proposition that under no circumstances the court can direct that blood tests be conducted. It, having regard to the future of the child, has, of course, sounded a note of caution as regard mechanical passing of such order. In some other jurisdictions, it has been held that such directions should ordinarily be made if it is in the interest of the child.

h 40. We may now take note of some of the decisions cited by the learned counsel of the parties.

41. In *Bipinchandra Shantilal Bhatt*¹ it was held: (AIR p. 252, para 7)

"7. But Miss Shah then relied on a case reported in *Md. Ibrahim v. Mohd. Marakayar*¹¹, where it was held that when the question of unsoundness of mind of the plaintiff arises not only under Order 32 Rule 15 but also as a substantial issue in the suit, the Court has ample jurisdiction to inquire into the question whether the plaintiff is really by reason of the unsoundness of mind or mental infirmity incapable of protecting his interests. Now, this is an entirely different state of affairs. In the case cited, it was a question of the unsoundness of the mind of the plaintiff and the Court had to find out whether the Court would allow him to conduct the proceedings, or appoint somebody else to look after his interest and it was pointed out that it was always for the Court before which the matter came to be decided whether the plaintiff was capable of managing his own interest. That is not so in a case where it is alleged by a petitioner in a matrimonial petition that respondent is suffering from incurable unsoundness of mind. It is for the petitioner in such a case to establish such unsoundness of mind. It does not there become incumbent on the Court to find out whether the respondent is capable of taking care of his matrimonial home. That case, therefore, has no application to the facts of the case before me."

42. In *Revamma*² the Court relied upon the decision of the Gujarat High Court in *Bipinchandra Shantilal Bhatt*¹ and also the decision of the Andhra Pradesh High Court in *Pulavarthi Sreeramamurthi v. Pulavarthi Lakshmikantham*¹⁹ for laying down a law that Section 151 of the Code of Civil Procedure cannot be taken recourse to for the purpose of compelling a person to be subjected to a medical examination. We do not agree.

43. In *Shanti Devi*³, *Bipinchandra Shantilal Bhatt*¹ was followed. In that case the respondent was already under the treatment of a doctor. A doctor was examined and only after recording of the evidence of the doctor and an application was filed that the respondent be permitted to undergo medical examination for the purpose of finding out as to whether unsoundness of mind of the respondent was incurable or not.

44. It was held that nobody can be forced to go to a mental hospital to undergo a medical treatment and it would be for the court to draw an adverse inference against him for not doing so.

45. In *P.A. Anbu Anandan*⁶ the question before the Court was as to whether there had been a consummation of marriage. Following *Goutam Kundu*⁵ it was held that the court cannot compel a person for compulsory medical examination of a party against his wish.

46. In *Ningamma*⁷ it was observed: (AIR p. 59, para 21)

"21. ... Right to personal liberty is also very important. To compel a person to undergo or to submit himself or herself to medical examination of his or her blood test or the like without his consent or against his wish

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a tantamounts to interference with his fundamental right of life or liberty particularly even when there is no provision either in the Code of Civil Procedure or the Evidence Act or any other law which may be said to authorize the Court to compel a person to undergo such a medical test as blood group test or the like against his wish, and to create doubt about the chastity of a woman or create doubt about the man's paternity. It will amount to nothing but interference with the right of personal liberty. Here as mentioned earlier, Section 112 read with Section 4, Evidence Act really have the effect of completely closing and debarring the party from leading any evidence with respect to the fact which the law says that to be the conclusive proof of legitimacy and paternity of child covered by Section 112 of Evidence Act, except by showing that during the relevant periods of time as referred to in Section 112 the parties to the marriage had no access to each other, and the allowing of medical test to test the blood group to determine paternity would run counter to the mandate of Article 21 of the Constitution as well and inherent powers are not meant to be exercised to interfere with the fundamental right of life and liberty of the person nor to nullify or stultify any statutory provision."

Therein the Court was again considering the question as to whether a child was born out of the wedlock or not.

d 47. However, there have been several judgments where such a power has been found to be existing in the court.

e 48. Mookerjee, A.C.J. speaking for a Division Bench in *Birendra Kumar Biswas*⁹ in a case under Section 19 of the Divorce Act for rescission of marriage contract on the ground of existence of syphilis in one party to marriage after taking into consideration a large number of decisions, observed: (AIR p. 464)

f "In these circumstances, we must hold that there has not been that full investigation of the case which the gravity of the result to the parties concerned required. The appeal must consequently be allowed and the case remanded for retrial. The allegation of fraud will be investigated and the question whether the condition of the respondent makes the rule of impotency as explained above applicable will be carefully reconsidered. We may add that it is necessary that there should be a proper medical examination of the person of the respondent. Reference may on this point be made to the following passage from the judgment of Lord Stowell in *Briggs v. Morgan*²⁰:

g 'It has been said that the means resorted to for proof on these occasions are offensive to natural modesty, but nature has provided no other means, and we must be under the necessity of saying that all relief shall be denied or of applying the means within our power. The court must not sacrifice justice to notions of delicacy of its own.'

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See also *Norton v. Seton*²¹; *Pollard v. Wybourn*²²; *Aleson v. Aleson*²³; *Sparrow v. Harrison*²⁴; affirmed in *Harrison v. Harrison*²⁵. Where a party refuses to attend for medical inspection, the court may properly draw an unfavourable inference. This was laid down in the case of a female respondent *F. v. P.*²⁶ and was extended to the case of a male respondent in *B. v. B.*²⁷, and was applied again in the case of a female respondent in *W. v. S.*²⁸ The courts naturally exercise a wide discretion in ordering physical examination and always do so, subject to such conditions as will afford protection from violence to natural delicacy and sensibility. We understand that the respondent does not object to a proper medical examination.”

49. In *G. Venkatanarayana*⁸ the Andhra Pradesh High Court upon taking into consideration its earlier decision as also judgments of other High Courts including *Bipinchandra Shantilal*¹, *Revamma*² held: (AIR pp. 3-4, para 6)

“The close affinity between law and medicine is demonstrated by medical jurisprudence. The physician as an expert witness has become a common and welcome feature in courts ranging from opinions on nature and degree of injuries to the proximate cause of death in criminal cases, assessment of insanity and several other situations. When there is a dispute between the wife and husband about the potency of either of them their evidence reflected by truth constitutes the cream of evidence and the marshalling of adventitious or extraneous circumstances afford a poor substitute. In the event of diametrically opposite and rival versions of the parties the recourse to medical test resolves the riddle and the medical opinion assumes the acceptable piece of evidence. In the present atmosphere of looking forward to progeny of artificial insemination, scientific probe by virginity tests and the knowledge of pre-delivery sex the depreciation of the importance of determination of potency by medical test does not bear the impress of realistic approach.”

(See also *George Swamidoss Joseph*¹⁰.)

50. We wish to point out that the question as to whether a person is mentally ill or not although may be a subject-matter of litigation, the court having regard to the provisions contained in Order 32 Rule 15 of the Code of Civil Procedure, Section 41 of the Indian Lunacy Act as also for the purpose of judging his competence to examine as a witness may issue requisite directions. It is, therefore, not correct to contend that for the aforementioned purposes the court has no power at all. The prime concern of the court is to find out as to whether a person who is said to be mentally ill could defend

21 (1819) 3 Phill Ecc 147 : 161 ER 1283

22 (1828) 1 Hag Ecc 725 : 162 ER 732

23 (1728) 2 Lee App 576 : 161 ER 445

24 (1841) 3 Curt 16 : 163 ER 638

25 (1842) 4 Moo PC 96 : 13 ER 238

26 (1896) 75 LT 192

27 (1901) P 39 : 70 LJ P 4

28 (1905) P 231 : 93 LT 456

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- a himself properly or not. Determination of such an issue although may have some relevance with the determination of the issue in the lis, nonetheless, the court cannot be said to be wholly powerless in this behalf. Furthermore, it is one thing to say that a person would be subjected to a test which would invade his right of privacy and may in some case amount to battery; but it is another thing to say that a party may be asked to submit himself to a psychiatrist or a psychoanalyst so as to enable the court to arrive at a just conclusion. Whether the party to the marriage requires a treatment or not can be found out only in the event, he is examined by a properly qualified psychiatrist. For the said purpose, it may not be necessary to submit himself to any blood test or other pathological tests.

- b 51. If the court for the purpose envisaged under Order 32 Rule 15 of the Code of Civil Procedure or Section 41 of the Indian Lunacy Act can do it suo motu, there is no reason why it cannot do so on an application filed by a party to the marriage.

- c 52. Even otherwise the court may issue an appropriate direction so as to satisfy itself as to whether apart from treatment he requires adequate protection inter alia by way of legal aid so that he may not be subject to an unjust order because of his incapacity. Keeping in view of the fact that in a case of mental illness the court has adequate power to examine the party or get him examined by a qualified doctor, we are of the opinion that in an appropriate case the court may take recourse to such a procedure even at the instance of the party to the lis.

- d 53. Furthermore, the court must be held to have the requisite power even under Section 151 of the Code of Civil Procedure to issue such direction either suo motu or otherwise which, according to him, would lead to the truth.

- e **(B) Would subjecting a person to a medical test be in violation of Article 21 of the Constitution of India?**

- f 54. The right to privacy has been developed by the Supreme Court over a period of time. A Bench of eight Judges in *M.P. Sharma v. Satish Chandra*²⁹, AIR at pp. 306-07, para 18, in the context of search and seizure observed that:

- g "When the Constitution-makers have thought fit not to subject such regulation to constitutional limitations by recognition of a fundamental right to privacy, analogous to the American Fourth Amendment, we have no justification to import it, into a totally different fundamental right, by some process of strained construction."

- h 55. Similarly in *Kharak Singh v. State of U.P.*³⁰ the majority judgment observed thus: (AIR p. 1303, para 20)

"[T]he right of privacy is not a guaranteed right under our Constitution and therefore the attempt to ascertain the movements of an

²⁹ AIR 1954 SC 300 : 1954 Cri LJ 865

³⁰ AIR 1963 SC 1295 : (1963) 2 Cri LJ 329

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individual which is merely a manner in which privacy is invaded is not an infringement of a fundamental right guaranteed by Part III."

56. With the expansive interpretation of the phrase "personal liberty",^a this right has been read into Article 21 of the Indian Constitution. (See *R. Rajagopal v. State of T.N.*³¹ and *People's Union for Civil Liberties v. Union of India*³².) In some cases the right has been held to amalgam of various rights.

57. But the right to privacy in terms of Article 21 of the Constitution is not an absolute right.^b

58. In *Gobind v. State of M.P.*³³ it was held: (SCC p. 157, para 31)

"Assuming that the fundamental rights explicitly guaranteed to a citizen have penumbral zones and that the right to privacy is itself a fundamental right, that fundamental right must be subject to restriction on the basis of compelling public interest."^c

59. If there were a conflict between fundamental rights of two parties, that right which advances public morality would prevail. (See '*X*' v. *Hospital 'Z'*³⁴ and '*X*' v. *Hospital 'Z'*³⁵.) In *R. Rajagopal v. State of T.N.*³¹ this Court upon formulating six principles, however, hastened to add that they are only broad principles and neither exhaustive nor all-comprehending and indeed no such enunciation is possible or advisable.^d

60. In *Gobind v. State of M.P.*³³ it was held: (SCC p. 157, para 28)

"28. The right to privacy in any event will necessarily have to go through a process of case-by-case development. Therefore, even assuming that the right to personal liberty, the right to move freely throughout the territory of India and the freedom of speech create an independent right of privacy as an emanation from them which one can characterize as a fundamental right, we do not think that the right is absolute."^e

61. Having outlined the law relating to right to privacy in India, it is relevant in this context to notice that certain laws have been enacted by the Indian Parliament where the accused may be subjected to certain medical or other tests.^f

62. By way of example, we may refer to Sections 185, 202, 203, 204 of the Motor Vehicles Act, Sections 53 and 54 of the Code of Criminal Procedure and Section 3 of the Identification of Prisoners Act, 1920. Reference in this connection may also be made to Sections 269 and 270 of the Indian Penal Code. Constitutionality of these laws, if challenge is thrown, may be upheld.^g

31 (1994) 6 SCC 632 : AIR 1995 SC 264

32 (1997) 1 SCC 301

33 (1975) 2 SCC 148 : 1975 SCC (Cri) 468 : AIR 1975 SC 1378

34 (1998) 8 SCC 296

35 (2003) 1 SCC 500

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63. In *M. Vijaya v. Chairman and Managing Director, Singareni Collieries Co. Ltd.*³⁶ the Court, upon a detailed discussion of the competing rights of a private party and public right with reference to right to privacy of a person suspected of suffering from AIDS, held: (AIR pp. 513-14, paras 52-53)

“52. There is an apparent conflict between the right to privacy of a person suspected of HIV not to submit himself forcibly for medical examination and the power and duty of the State to identify HIV-infected persons for the purpose of stopping further transmission of the virus. In the interests of the general public, it is necessary for the State to identify HIV-positive cases and any action taken in that regard cannot be termed as unconstitutional as under Article 47 of the Constitution, the State was under an obligation to take all steps for the improvement of the public health. A law designed to achieve this object, if fair and reasonable, in our opinion, will not be in breach of Article 21 of the Constitution of India.

53. It is well settled that right to life guaranteed under Article 21 is not mere animal existence. It is a right to enjoy all faculties of life. As a necessary corollary, right to life includes right to healthy life.”

It was observed: (AIR p. 516, paras 59-60)

“59. Yet another aspect of the matter is whether compelling a person to take HIV test amounts to denying the right to privacy? In *Kharak Singh v. State of U.P.*³⁰, *Gobind v. State of M.P.*³³ and other cases, the Supreme Court held that right to privacy is one of the penumbral rights of Article 21 of the Constitution. In all situations, a person can be asked to undergo HIV test with informed consent. If a person declines to take a test, is it permissible to compel such person to take the test? The question is whether right to privacy is violated if a person is subjected to such test by force without his consent? By the end of 1991, 36 Federal States in USA enacted legislations regarding informed consent of HIV test. These legislations intended to promote voluntary test and risk-reduction counselling. In USA, law also applies for involuntary tests and disclosure of information about the people in prisons, mental hospitals, juvenile facilities and residential homes for mentally disabled persons. (See *AIDS Law Today* — Scott Burry and others published by Yale University — 1993.)

60. In India there is no general law as such compelling a person to undergo HIV/AIDS test. Indeed, Article 20 of the Constitution states that no person accused of any offence shall be compelled to be a witness against himself. Be that as it may, under prison laws, as soon as a prisoner is admitted to prison, he is required to be examined medically and the record of prisoners’ health is to be maintained in a register. Women prisoners can only be examined by the matron under the general or special powers of the medical officer. As per Section 37 of the Prisons

36 AIR 2001 AP 502 (FB)

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Act, any prisoner wanting to be medically examined or appearing to be sick has to be reported before the Jailor who in turn is liable to call the attention of the medical officer in that behalf and all the directions issued by the medical officer are to be recorded." a

It was also noticed: (AIR p. 516, paras 61-62)

"61. Under the ITP Act, the sex workers can also be compelled to undergo HIV/AIDS test. When sex workers are detained in corrective institutions or welfare homes either under Section 10-A or under Section 17(4) or 19(2) of the Act, there are adequate provisions for medical examination. There are also provisions in segregating rescued women who are suffering from venereal diseases. We may also notice that Section 2 of Dissolution of Muslim Marriages Act, 1939, Section 32 of Parsi Marriage and Divorce Act, 1936, Section 10 of Indian Divorce Act, 1869, Section 13 of Hindu Marriage Act, 1956 and Section 27 of the Special Marriage Act, 1955 make incurable venereal diseases of either of spouses a ground for divorce. Further under Sections 269 and 270 of the Indian Penal Code, 1860, a person can be punished for negligent act of spreading infectious diseases. b

62. In cases of divorce on the ground that the other spouse is suffering from HIV/AIDS or in case under Sections 269 and 270 IPC, can the person be compelled to give blood specimen for HIV test. The immunity under Article 20 does not extend to compulsion of giving of blood specimens." d

64. The question may be considered even from the human rights' angle. Useful reference, in this connection, may be made to paras 149 and 164 of *Halsbury's Laws of England*, 4th Edn., Reissue, Vol. 8(2), which are as under: e

"149. *Respect for private and family life, home and correspondence.*—Everyone has the right to respect for his private and family life, his home and his correspondence. There may be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well being of the country, or for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. f

* * *

164. *Prohibition of discrimination.*—The enjoyment of the rights and freedoms as set out in the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) must be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. g

This provision refers only to discrimination in respect of the enjoyment of the guaranteed rights and freedoms. However, its h

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application does not presuppose a breach of any of the other provisions of the Convention. It is sufficient if the facts of a case fall within the ambit of one or more of the substantive articles.

a

The provision may only be violated by a difference in treatment between persons who are in comparable situations which has no objective and reasonable justification. Contracting States enjoy a margin of appreciation in relation to the question of justification, which depends upon the circumstances, subject-matter and background of the case."

b

65. The Court of Appeal, however, in *R (on the application of S) v. Chief Constable of South Yorkshire*³⁷ upheld a legislation compelling preservation of fingerprints, bodily samples, DNA profiles and DNA samples despite Articles 8 and 14 etc. of the Human Rights Act, 1998 which are as under:

c

"8. *Right to respect for private and family life.*—(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

d

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

* * *

e

14. *Prohibition of discrimination.*—The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

f

66. Lord Woolf, C.J., emphasizing the importance of protecting the public against the consequences of crime, held that such law does not violate either Article 8(2) or 14 of the Act, observing: (All ER p. 161, paras 38-41)

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"38. The respondents strongly rely on the extent of the parliamentary scrutiny of the 2001 Act. It was extensive both in the House of Commons and in the House of Lords. In addition the Joint Committee on Human Rights carefully considered whether the amendment to Section 64 met the requirements of Article 8(2). The Joint Committee's Report issued on 23-4-2001 (HL Paper 69, HC 427) deals with the amended Section 64 provisions at paras 86-92. In that report, the Joint Committee stated (at para 88):

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'When we first looked at the Bill, we took the view that the clauses (in relation to the retention of fingerprints and samples) amounted to an interference with the person's right to respect for private life [Article 8(1) of the convention], but that they provided a sound legal basis for retention, by ensuring that the circumstances in which retention and use were to be permitted were sufficiently

³⁷ (2003) 1 All ER 148 (CA)

clearly defined, appropriately directed, and limited in scope, in order to satisfy the justifying conditions under Article 8.2.

39. Mr Gordon strongly contests the correctness of the Joint Committee's assessment of the amendment but I respectfully agree with the Committee's approach. I regret to say that I cannot understand Mr Gordon's submission that no justification has been shown for the amendment. Its purpose is obvious. The purpose is lawful. It is strictly confined to situations in which fingerprints and samples have been taken in accordance with Article 8. The fingerprints and samples can only be used for a purpose of 'the prevention or detection of crime, the investigation of an offence or the conduct of a prosecution'. Language which is very similar to that in Article 8(2).

40. In addition I regard the retention as being proportionate. By confining the retention to fingerprints and samples which have already lawfully been taken the amended provision limits the Article 8(1) interference significantly. As against that limited intrusion the scale of the database and therefore its value is substantially increased. I find myself in complete agreement with the Divisional Court that the interference with Article 8(1) rights of the individuals from whom the fingerprints and samples are taken is justified by Article 8(2).

41. In considering whether the interference with Article 8(1) is justified, it is relevant that if my approach to the article is correct, in this jurisdiction Article 8(1) may have a longer reach than is strictly required by the convention as applied by Strasbourg. If this is the result of the approach of society here then Parliament, as the democratically-elected body representative of the public, has undoubtedly the untrammelled right to establish the circumstances in which interference is justified as long as it does not fall below the standard set by the convention, proportionality."

As regard Article 14 issue, the learned Judge stated: (All ER p. 162, para 46)

"46. In the present circumstances when an offence is being investigated or is the subject of a charge it is accepted that fingerprints and samples may be taken. Where they have not been taken before any question of the retention arises they have to be taken so there would be the additional interference with their rights which the taking involves. As no harmful consequences will flow from the retention unless the fingerprints or sample match those of someone alleged to be responsible for an offence the different treatment is fully justified."

Waller, L.J., observed: (All ER p. 165, paras 61-63)

"61. The answer to Liberty's points is as I see it as follows. First the retention of samples permits (a) the checking of the integrity and future utility of the DNA database system; (b) a reanalysis for the upgrading of DNA profiles where new technology can improve the discriminating power of the DNA-matching process; (c) reanalysis and thus an ability to extract other DNA-markers and thus offer benefits in terms of speed,

- a sensitivity and cost of searches of the database; (d) further analysis in investigations of alleged miscarriages of justice; and (e) further analysis so as to be able to identify any analytical or process errors. It is these benefits which must be balanced against the risks identified by Liberty. In relation to those risks, the position in any event is first that any change in the law will have to be itself convention-compliant; second any change in practice would have to be convention-compliant; and third unlawfulness must not be assumed. In my view thus the risks identified are not great, and such as they are they are outweighed by the benefits in achieving the aim of prosecuting and preventing crime.

- b
- c 62. The answer to the first question posed by Liberty is first that the fact that other jurisdictions do things differently cannot provide an automatic answer that this jurisdiction must be in breach of the convention, and in any event second, judicial scrutiny of the question of whether retention should be allowed does not provide an answer to any of the risks identified by Liberty which occur whether Judges have scrutinized the question of retention or whether retention is on the basis provided for by the new section.

- d 63. The answer to the second question is that retention of the samples is beneficial in all the ways identified, and in particular it ensures the integrity and future utility of the database. The benefits outweigh any risks identified. The law is proportionate to the aim being sought to be achieved. That is so because in the fight against crime, there is the need to be allowed to retain the samples lawfully taken. To keep profiles alone would not be sufficient."

- e 67. In the United States of America, such laws have been held not to violate the Fifth Amendment of the US Constitution. In *Armando Schmerber v. State of California*³⁸ obtaining of an alcohol test has been held not to be unconstitutional. Similarly in *Paul H. Breithaupt v. Morris Abram*³⁹ taking of blood sample from an accused has been held to be not in violation of the Constitution Fifth Amendment. In *Charles Joseph Kastigar v. United States*⁴⁰ it is stated:

- f "The power of government to compel persons to testify in court or before grand juries and other governmental agencies is firmly established, but is not absolute, being subject to a number of exemptions, the most important of which is the Fifth Amendment privilege against self-incrimination."

- g 68. In *Encyclopaedia of the American Constitution*, Vol. 6, at p. 2677 under the heading "Testimonial and Non-testimonial Compulsion", it is stated:

"The court prefers a different formulation: does non-testimonial compulsion force a person to be a witness against himself criminally?"

- h 38 384 US 757 : 16 L Ed 2d 908 (1966)
39 352 US 432 : 1 L Ed 2d 448 (1957)
40 32 L Ed 2d 212 : 406 US 441 (1972)

The consistent answer has been 'No', even if there was a testimonial dimension to the forced admissions. If that testimonial dimension loomed too large, the court loosened its distinction between testimonial and non-testimonial compulsion and relied on some other distinction. Thus, when the driver of a vehicle involved in an accident was required by State law to stop and identify himself, though doing so subjected him to criminal penalties, the court saw no Fifth Amendment issue, only a regulation promoting the satisfaction of civil liabilities. Similarly, when a lawyer or accountant was forced to turn over a client's incriminating records, the client had not been compelled at all, though he paid the criminal penalty and lost the chance to make a Fifth Amendment plea. And when the police during the course of a lawful search found incriminating business records, the records were introduced in evidence, although they could not have been subpoenaed directly from the businessman. In these cases, where the compulsion was communicative or testimonial in character, the court inconsistently discoursed on the need to decide as it did in order to avoid a decision against the introduction of non-testimonial evidence that had been compelled."

We may further notice that this Court in *State of Bombay v. Kathi Kalu Oghad*⁴¹ and *State (Delhi Admn.) v. Gulzari Lal Tandon*⁴² has held that a direction to give specimen signature or handwriting for their comparison with the disputed handwriting is not violative of clause (3) of Article 20 of the Constitution of India.

69. Such issues have cropped up in the United States of America in dissolution of marriage proceedings or a child-custody dispute. In the course of such proceedings, mental health and parental fitness is sometimes called into question by one of the parties. Frequently one party will seek to introduce evidence of the other party's mental health through medical records. However, Federal common law, State common law, State statutes and the Federal rules of evidence recognize the importance of protecting confidential communication with mental health professionals by recognizing a psychotherapist-patient privilege. Still, in such court proceedings, it has been held by US courts that no privilege is absolute specially when it relates to determining the fitness of the parents to have the custody of the child. The privilege can seriously impact the child custody and dissolution of the marriage proceedings. In *Matthew R., Re*⁴³ it was held that such privilege if granted can seriously impact the child custody and dissolution of marriage proceedings.

70. If the nature of the information relates directly to the well being of the child or to the parent's ability to adequately care for the child, and the court believes the child is potentially in danger, courts are likely to admit the information despite a patient's expectation of confidentiality. There are two

41 AIR 1961 SC 1808 : (1961) 2 Cri LJ 856

42 (1979) 3 SCC 316 : 1979 SCC (Cri) 526 : AIR 1979 SC 1382

43 113 Mo App 701, 715, 688 A 2d 955, 961

a competing interests involved when a court determines whether to compel discovery of a patient-litigant's mental health records over his objection in a child-custody dispute. The first involves the privacy, confidentiality and privilege expectation of both the patient and the treating mental health professional in those communications. The second involves the application of the best interests of the child(ren) standard. Virtually every jurisdiction in the United States makes a child-custody determination based upon the "best interest of the child".

b 71. "Privacy" is defined as "the state of being free from intrusion or disturbance in one's private life or affairs". Mental health treatment involves disclosure of one's most private feelings. In sessions, therapists often encourage patients to identify "thoughts, fantasies, dreams, terrors, embarrassments, and wishes". To allow these private communications to be publicly disclosed abrogates the very fibre of an individual's right to privacy, the therapist-patient relationship and its rehabilitative goals. However, like
c any other privilege the psychotherapist-patient privilege is not absolute and may only be recognized if the benefit to society outweigh the costs of keeping the information private. Thus if a child's best interest is jeopardized by maintaining confidentiality the privilege may be limited.

d 72. In *Zuniga v. Pierce*⁴⁴ the Court reconciles these competing interests by balancing the interests involved. The Court stated: "This is necessarily so because the appropriate scope of the privilege like the privilege itself, is determined by balancing the interests protected by shielding the evidence sought with those advanced by disclosure." The tripartite test states that a "legitimate need" must be present for the evidence to exist, the relevancy and materiality to the issue before the court, and the moving party must
e demonstrate that the information to which they are seeking access "cannot be secured from any less-intrusive source". Allowing the court to order independent examination of a parent's mental faculties without piercing the confidentiality of the patient-psychotherapist relationship avoids thwarting the psychotherapeutic process as well as allows the court to have all relevant evidence before it in order to make the best decision regarding the best
f interests of the children.

g 73. *Laznovsky v. Laznovsky*⁴⁵ is the most recent case addressing the admissibility of mental health records of a parent in a child-custody proceeding. The court utilized the same balancing test used by most jurisdictions. It weighed the best interest of the child standard and the important interest in placing the child in the most safe, stable, and nurturing environment possible versus protecting confidential information revealed in the course of therapy compromising the psychotherapist-patient privilege and a basic right to privacy. The Court concluded that "the benefits to society of having confidential and privileged treatment available to troubled parents far outweighs the limitations placed upon the court by not having such information revealed against a parent's wishes".

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44 714 F 2d 632 (1983)

45 74.5 A 2d 1054 (Md Ct App 2000)

74. At this stage we may observe that taking of a genetic sample without consent may in some countries e.g. Canada be viewed as a violation of the person's physical integrity although the law allows such forced taking of sample. But even this practice was held to be valid when the sample is collected by a health-care professional. Collecting samples from the suspects for DNA tests in some countries has not been found to be violative of the right of privacy. a

75. In the response of the Privacy Commissioner of Canada to Department of Justice Consultation Paper — Obtaining and Banking DNA Forensic Evidence, it is stated: b

“3. *Collecting DNA from suspects.*—DNA evidence should not be collected from a suspect unless the information is relevant to a specific crime in question. For example, it would be appropriate to obtain a DNA sample from a suspect where DNA evidence is left at the scene of the crime and the suspect's DNA is needed to prove the suspect's involvement. c

DNA evidence should not be collected from suspects as a matter of routine. To do so would cause an unnecessary privacy intrusion; in the vast majority of criminal cases DNA evidence will contribute nothing to the investigation. Thus, it would not be appropriate for Parliament to give blanket authority to collect DNA samples from all persons suspected of indictable offences. DNA should also not be collected from a suspect if investigators have no DNA evidence with which to compare the suspect's sample. d

Nor would a DNA sample from the suspect be necessary if the suspect admitted guilt. e

However, as a practical matter, the DNA evidence might be critically important in getting the suspect to admit guilt in the first place.

As well, there should be reasonable grounds for suspecting that the person committed the offence before taking the DNA sample. It would not be acceptable to require all men in a given community to submit DNA samples to solve a specific crime. f

Broad-based testing of whole groups within a community would represent an unjustifiable intrusion into the lives of too many innocent people. As a further privacy safeguard, DNA evidence should be collected from a suspect only if a judge authorizes the collection.

In our 1992 Report, *Genetic Testing and Privacy*, we discussed limiting the collection of DNA samples to cases involving criminal violence. The types of violent crimes for which DNA samples might be collected should be set out in legislation. The list of violent crimes set out in New Zealand's recently introduced Criminal Investigations (Blood Samples) Bill offers an example of the types of crimes for which DNA testing might be considered in Canada. It may also be appropriate to allow the collection of samples for other crimes, such as conspiracies to commit offences involving violence. For example, it should be lawful for g
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- a samples to be taken if DNA evidence could help convict someone suspected of planning a terrorist act or murder (perhaps the suspect had left DNA on a stamp he licked and attached to a letter implicated in the crime)."

- b 76. The matter may be considered from another angle. In all such matrimonial cases where divorce is sought, say on the ground of impotency, schizophrenia etc. normally without there being medical examination, it would be difficult to arrive at a conclusion as to whether the allegation made by a spouse against the other spouse seeking divorce on such a ground, is correct or not. In order to substantiate such allegation, the petitioner would always insist on medical examination. If the respondent avoids such medical examination on the ground that it violates his/her right to privacy or for that matter right to personal liberty as enshrined under Article 21 of the Constitution of India, then it may in most of such cases become impossible to
- c arrive at a conclusion. It may render the very grounds on which divorce is permissible nugatory. Therefore, when there is no right to privacy specifically conferred by Article 21 of the Constitution of India and with the extensive interpretation of the phrase "personal liberty" this right has been read into Article 21, it cannot be treated as an absolute right. What is emphasized is that some limitations on this right have to be imposed and particularly where
- d two competing interests clash. In matters of the aforesaid nature where the legislature has conferred a right upon his spouse to seek divorce on such grounds, it would be the right of that spouse which comes in conflict with the so-called right to privacy of the respondent. Thus the court has to reconcile these competing interests by balancing the interests involved.

- e 77. If for arriving at the satisfaction of the court and to protect the right of a party to the lis who may otherwise be found to be incapable of protecting his own interest, the court passes an appropriate order, the question of such action being violative of Article 21 of the Constitution of India would not arise. The court having regard to Article 21 of the Constitution of India must also see to it that the right of a person to defend himself must be adequately protected.

- f 78. It is, however, axiomatic that a court shall not order a roving inquiry. It must have sufficient materials before it to enable it to exercise its discretion. Exercise of such discretion would be subjected to the supervisory jurisdiction of the High Court in terms of Section 115 of the Code of Civil Procedure and/or Article 227 of the Constitution of India. Abuse of the discretionary power at the hands of a court is not expected. The court must
- g arrive at a finding that the applicant has established a strong prima facie case before passing such an order.

- h 79. If despite an order passed by the court, a person refuses to submit himself to such medical examination, a strong case for drawing an adverse inference would be made out. Section 114 of the Indian Evidence Act also enables a court to draw an adverse inference if the party does not produce the relevant evidences in his power and possession.

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80. So viewed, the implicit power of a court to direct medical examination of a party to a matrimonial litigation in a case of this nature cannot be held to be violative of one's right of privacy. a

81. To sum up, our conclusions are:

1. A matrimonial court has the power to order a person to undergo medical test.

2. Passing of such an order by the court would not be in violation of the right to personal liberty under Article 21 of the Indian Constitution. b

3. However, the court should exercise such a power if the applicant has a strong prima facie case and there is sufficient material before the court. If despite the order of the court, the respondent refuses to submit himself to medical examination, the court will be entitled to draw an adverse inference against him.

82. Subject to the observations made hereinbefore, we are of the opinion that the High Court cannot be said to have committed a jurisdictional error in passing the impugned judgment. This appeal is, therefore, dismissed. However, in the facts and circumstances of the case there shall be no order as to costs. c

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(BEFORE SHIVARAJ V. PATIL AND H.K. SEMA, JJ.)

KUNAL SINGH

Appellant;

Versus

UNION OF INDIA AND ANOTHER

Respondents. e

Civil Appeal No. 1789 of 2000[†], decided on February 13, 2003

A. Service Law — Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 — Ss. 47 (Ch. VIII), 32, 33, 38 (Ch. VI) and 2(e), (i)(v), (k), (o), (t) & (w) (Ch. I) — Prohibition in S. 47 against dispensing with the services of an employee acquiring a disability during his service, and provision for shifting him to some other post in case of consequent unsuitability for the post he was holding — Nature and applicability — Held, mandatory — Employee of an establishment, which was not exempted from S. 47, acquiring disability during service and getting incapacitated — Such an employee, held, covered by S. 47(i)(v) — Hence, is entitled to the benefit of S. 47 — Further held, such an employee was one who had acquired “disability” within the meaning of S. 2(i)(v) and not a “person with disability” — Distinction between the said two expressions pointed out — Definition clause — Two distinct definitions of a cognate word or expression in the same enactment, held, must be understood accordingly in terms of the definition — Social beneficial statutes — In construing the provisions of such statutes the view advancing the object of the Act and serving its object, held, must be preferred to the one which obstructs the object and paralyses that purpose f

[†] From the Judgment and Order dated 21-4-1999 in CWP No. 9 of 1999 of the High Court of H.P. at Shimla g

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(BEFORE K.G. BALAKRISHNAN, C.J. AND R.V. RAVEENDRAN
AND J.M. PANCHAL, JJ.)

a SELVI AND OTHERS .. Appellants;

Versus

STATE OF KARNATAKA .. Respondent.

Criminal Appeals No. 1267 of 2004[†] with Nos. 54-59 of 2005,
1199 of 2006, 1471 of 2007 and 987 & 990 of 2010[‡],
decided on May 5, 2010

b A*. Criminal Trial — Investigation — Narcoanalysis, polygraph test (lie-detector test) and BEAP (Brain Electrical Activation Profile) test conducted against will of person subjected to such tests (the 'test subject') — Whether legally permissible — Voluntary undertaking of tests by test subject and extent of their admissibility in evidence — Held, tests when conducted under
c compulsion violate right against self-incrimination protected under Art. 20(3) and right to personal liberty protected under Art. 21 — Tests also violate the right to remain silent under S. 161(2) CrPC

— Though conducting of certain medical tests on accused is permissible under Explan. (a) to S. 53, Ss. 53-A and 54 CrPC, yet narcoanalysis, polygraph and BEAP tests are not included in those tests — General expression "such other tests" in Explan. (a) cannot be construed as covering
d these three tests because they are not of the same category to which tests specified in Explan. (a) belong — Interpretational rule of *ejusdem generis* does not permit their inclusion — Moreover, legislative intent is clear from the fact that Parliament while amending the said Explan. (a) in 2005 did not include these tests despite the fact that these tests were in existence at that time

e — These tests cannot also be accorded same treatment as is given to collection of specimen signatures and handwriting samples for the reason that specimen signatures and handwriting samples are not used as testimony against test subject but are used for identification or corroboration of facts already known to investigators

— Arts. 20(3) & 21 of the Constitution and S. 161(2) CrPC are violated by narcoanalysis, polygraph and BEAP tests because of following reasons:

f — Art. 20(3) and S. 161(2) CrPC — These provisions protect accused, suspects and witnesses from being compelled to make self-incriminating statements — Testimonial compulsion is prohibited by law — Person concerned has right to remain silent on questions which may incriminate him — This protection is lost in case of narcoanalysis because test subject under the influence of drug (sodium pentothal) injected into his body loses control over his verbal responses and therefore cannot decide consciously
g about the questions which he should not answer — In polygraph test, physiological responses like blood pressure, respiratory flow, pulse rate, galvanic skin resistance, etc. are measured after putting certain questions to test subject — He has no conscious control over these responses — Similar is

h [†] From the Judgment and Order dated 10-9-2004 of the High Court of Karnataka at Bangalore in Crl. Petition No. 1964 of 2004

[‡] Arising out of SLPs (Crl.) Nos. 10 of 2006 and 6711 of 2007

* Ed.: See the *Shortnotes* below for the detail on each aspect summarised in *Shortnote A*.

the case with BEAP test wherein electrical waves emanating from test subject's brain are studied in response to probes — All these techniques involve testimonial compulsion — Thus, test subject's right not to reveal any information which may incriminate him, is violated a

— Art. 21 — Mental privacy which is an aspect of personal liberty under Art. 21, is intruded upon because common feature of these tests is that test subject's verbal or physiological responses are extracted in a manner that he has no conscious control over them — Such involuntary disclosure of information is also cruel, inhuman and degrading treatment to an individual, which is again a violation of Art. 21 — Impugned tests also violate right to fair trial because access to legal advice, which is a component of Art. 21, becomes meaningless when test subject is made to reveal information without having conscious control over it b

— Voluntary undertaking of tests by test subject and extent of their admissibility in evidence — Held, is permissible provided certain safeguards like the one recommended by National Human Rights Commission (NHRC) in case of polygraph test are observed — Similar safeguards directed to be devised for narcoanalysis and BEAP test also — But even such test-results are not admissible in evidence except that they can be put to use for a limited purpose as indicated in S. 27, Evidence Act, 1872 c

— Constitution of India — Arts. 20(3) and 21 — Criminal Procedure Code, 1973 — Ss. 2(g), 53 Expln. (a), 53-A, 54 and 154 to 176 [particularly S. 161(2)] — Evidence Act, 1872 — Ss. 24 to 27 — Human and Civil Rights — Protection of Human Rights Act, 1993 — S. 12(d) — Employee Polygraph Protection Act, 1988 (USA) — Federal Rules of Evidence, 1975 (USA) — R. 702 — Rules of Evidence (New Mexico, USA) — Art. 707 — Interpretation of Statutes — Subsidiary rules — *Ejusdem generis* (Paras 262 to 265) d

In this case, legality of three scientific tests, namely, narcoanalysis, polygraph test (lie-detector test) and Brain Electrical Activation Profile (BEAP) test, was challenged inter alia on the ground that these tests violate the test subject's rights under Articles 20(3) and 21 of the Constitution and under Section 161(2) of the Criminal Procedure Code, 1973. e

In narcoanalysis, intravenous injection of sodium pentothal is given to test subject due to which the test subject enters into hypnotic trance, and answers questions put to him without having conscious control over the replies which may be incriminating to him. He may reveal information which he may otherwise conceal in a state of full consciousness. f

In polygraph test, instruments like cardiographs, pneumographs, cardio-cuffs, sensitive electrodes, etc. are attached to test subject's body. Physiological responses like respiration, blood-pressure, blood flow, pulse rate, galvanic skin resistance, etc. in his body are measured after putting certain questions to him. Theory behind polygraph test is that when a person is giving false reply to an incriminating question put to him, he would produce physiological responses which are different from the responses given in normal course. g

In BEAP test (which is also known as "P300 waves test"), electrical waves emitted from test subject's brain are recorded by attaching electrodes to his scalp. The test subject is exposed to auditory or visual stimuli (words, sounds, pictures, videos) that are relevant to the facts being investigated (known as material probes), alongside other irrelevant words and pictures (known as neutral probes). The underlying theory is that in case of guilty suspects, exposure to h

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material probes will lead to emission of P300 wave components. By examining records of these wave components, the examiner can make inferences about test subject's familiarity with information related to crime.

a

Holding all three tests to be impermissible, the Supreme Court held as above.

State v. Levitt, 36 NJ 266 (1961); *State v. Sinnott*, 132 A 2d 298 (1957), referred to *Frye v. United States*, 54 App DC 46 (1923); *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 125 F.3d 469 : 509 US 579 (1993); *United States v. Piccinonna*, 885 F.2d 1529 (11th Cir 1995); *United States v. Posado*, 57 F.3d 428 (5th Cir 1995); *United States v. Galbreth*, 908 F.Supp 877 (DNM 1995); *United States v. Cordoba*, 104 F.3d 225 (9th Cir 1997); *Brown v. Darcy*, 783 F.2d 1389 (9th Cir 1986); *United States v. Scheffer*, 140 L.Ed 2d 413 : 523 US 303 (1998); *R. v. Beland*, (1987) 36 CCC 3d 481 : (1987) 2 SCR 398 (Can SC); *Gillie v. Posho Ltd.*, (1939) 2 All ER 196 (PC); *State v. Hudson*, 314 Mo 599 (1926); *State v. Lindemuth*, 56 NM 237 (1952); *People v. Jones*, 42 Cal 2d 219 (1954); *Lindsey v. United States*, 237 F.2d 893 (9th Cir 1956); *Lawrence M. Dugan v. Commonwealth of Kentucky*, 333 SW 2d 755 (1960); *Townsend v. Sain*, 9 L.Ed 2d 770 : 372 US 293 (1962); *United States v. Swanson*, 572 F.2d 523 (5th Cir 1978); *United States v. Solomon*, 753 F.2d 1522 (9th Cir 1985); *United States v. Adams*, 581 F.2d 193 (9th Cir 1978); *State of New Jersey v. Daryll Pitts*, 56 A 2d 1320 (NJ 1989); *Horvath v. R.*, (1979) 44 CCC 2d 385 : (1979) 2 SCR 376 (Can SC); *Ibrahim v. R.*, 1914 AC 599 : (1914-15) All ER Rep 874 (PC); *Rock v. Arkansas*, 97 L.Ed 2d 37 : 483 US 44 (1987); *Harrington v. State*, 659 NW 2d 509 (2003) (Iowa SC); *Slaughter v. Oklahoma*, 105 P 3d 832 (2005), discussed

b

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e

36 American Criminal Law Review 87-116 (Winter 1999) at p. 91; 33 American Journal of Law and Medicine 377-421 (2007); 42(4) The Journal of Criminal Law, Criminology and Police Science 513-528 (November-December 1951); *Schaffer Library of Drug Policy*, <www.druglibrary.org>; 46(2) The Journal of Criminal Law, Criminology and Police Science 259-263 (July-August 1955); 62 Yale Law Journal 315-347 (February 1953); 40(3) Journal of Criminal Law and Criminology 370-380 (September-October 1949); 52(4) The Journal of Criminal Law, Criminology and Police Science 453-458 (November-December 1961); 50(2) The Journal of Criminal Law, Criminology and Police Science 118-123 (July-August 1959); 70 University of Missouri at Kansas City Law Review 891-920 (Summer 2002); Lawrence A. Farwell, *Brain Fingerprinting: A New Paradigm in Criminal Investigations and Counter-Terrorism* (2001) <www.brainwavescience.com>; 33 American Journal of Criminal Law 301-337 (Summer 2006); 33 American Journal of Law and Medicine 359-375 (2007); 29 Journal of Legal Medicine 179-197 (April-June 2008), discussed

f

Laboratory Procedure Manual—Polygraph Examination (Directorate of Forensic Science, Ministry of Home Affairs, Government of India, New Delhi, 2005), considered

B. Constitution of India — Art. 20(3) — Right against self-incrimination — Underlying purpose — Held, is to ensure integrity of the trial — Statement, if any, made by accused during investigation must be voluntary and reliable — Statement made out of compulsion may be false thus affecting the integrity of the trial — Investigating agencies, which are required to conduct meaningful investigation before subjecting a person to trial, should not have any scope of extracting statement through compulsive methods — Evidence Act, 1872 — Ss. 24 to 26 — Criminal Procedure Code, 1973 — Ss. 157, 161 and 162

g

Held :

Right against self-incrimination is now viewed as an essential safeguard in criminal procedure. Its underlying rationale broadly corresponds with two objectives—firstly, that of ensuring reliability of statements made by an accused, and secondly, ensuring that such statements are made voluntarily. It is possible that a person suspected or accused of a crime may have been compelled to testify

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through methods involving coercion, threats or inducements during investigative stage. When a person is compelled to testify on his/her own behalf, there is a higher likelihood of such testimony being false. False testimony is undesirable since it impedes the integrity of the trial and the subsequent verdict. Therefore, the purpose of the rule against involuntary confessions is to ensure that testimony considered during trial is reliable. The premise is that involuntary statements are more likely to mislead Judge and prosecutor, thereby resulting in a miscarriage of justice. Even during the investigative stage, false statements are likely to cause delays and obstructions in investigation efforts. (Para 102)

Concerns about voluntariness of statements allow a more comprehensive account of this right. If involuntary statements were readily given weightage during trial, investigators would have a strong incentive to compel such statements—often through methods involving coercion, threats, inducement or deception. Even if such involuntary statements are proved to be true, the law should not incentivise use of interrogation tactics that violate dignity and bodily integrity of the person being examined. In this sense, right against self-incrimination is a vital safeguard against torture and other third-degree methods that could be used to elicit information. It serves as a check on police behaviour during the course of investigation. Exclusion of compelled testimony is important otherwise investigators will be more inclined to extract information through such compulsion as a matter of course. Frequent reliance on such short cuts will compromise the diligence required for conducting meaningful investigations. During the trial stage, the onus is on the prosecution to prove the charges levelled against the defendant and the right against self-incrimination is a vital protection to ensure that the prosecution discharges the said onus. (Para 103)

State of Bombay v. Kathi Kalu Oghad, AIR 1961 SC 1808 : (1961) 2 Cri LJ 856 : (1962) 3 SCR 10; *Murphy v. Waterfront Commission of New York Harbor*, 12 L Ed 2d 678 : 378 US 52 (1963); *Wong Kam-ming v. R.*, 1980 AC 247 : (1979) 2 WLR 81 : (1979) 1 All ER 939 (PC); *Nandini Satpathy v. P.L. Dani*, (1978) 2 SCC 424 : 1978 SCC (Cri) 236, *relied on* 33 University of California Los Angeles Law Review 1063-1148 (1986); 27 Oxford Journal of Legal Studies 209-232 (Summer 2007), *referred to* 51 Journal of Criminal Law, Criminology and Police Science 138 (1960), *considered*

C. Constitution of India — Art. 20(3) — Rule against testimonial compulsion — Scope of the rule explained — Narcoanalysis, polygraph test, BEAP test, collection of specimen signatures and handwriting samples examined on the touchstone of rule — Held, oral or written statement conveying personal knowledge, likely to lead to incrimination by itself or furnishing a link in chain of evidence comes within the prohibition of Art. 20(3) — The rule however does not prohibit: (i) collection of material evidence such as bodily substances and other physical objects, and (ii) statement used for comparison with facts already known to investigators — Narcoanalysis, polygraph and BEAP tests result in testimonial compulsion but it is not so in the case of specimen signatures and handwriting samples — It is for this reason that narcoanalysis, polygraph and BEAP tests are not permissible in law while specimen signatures and handwriting samples are permissible — Evidence Act, 1872 — Ss. 24 to 26 and 47 — International Covenant on Civil and Political Rights, 1966 — Art. 14(3)(g) — European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950 — Arts. 6(1) and 6(2)

(Paras 145, 147, 153, 157, 180, 185 and 189)

State of Bombay v. Kathi Kalu Oghad, AIR 1961 SC 1808 : (1961) 2 Cri LJ 856 : (1962) 3 SCR 10, *followed*

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- Schmerber v. California*, 16 L Ed 2d 908 : 384 US 757 (1965); *Saunders v. United Kingdom*, (1996) 23 EHRR 313. *relied on*
- a *Holt v. United States*, 54 L Ed 1021 : 218 US 245 (1910). *referred to*
30 Cardozo Law Review 1023-46 (December 2008). *quoted*
94 Journal of Criminal Law and Criminology 243-293 (2004). *discussed*
State of Bombay v. Kathi Kalu Oghad, AIR 1961 SC 1808 : (1961) 2 Cri LJ 856 : (1962) 3 SCR 10; *M.P. Sharma v. Satish Chandra*, AIR 1954 SC 300 : 1954 Cri LJ 865 : 1954 SCR 1077; *Schmerber v. California*, 16 L Ed 2d 908 : 384 US 757 (1965). *relied on*
- b [Ed.: It is felt that the reasoning which has been applied to specimen signatures and handwriting samples is also applicable to fingerprint samples though it is not specifically discussed in this judgment. See also *H.P. Admn. v. Om Prakash*, (1972) 1 SCC 249; *State of Maharashtra v. Sukhdev Singh*, (1992) 3 SCC 700.]
- D. Constitution of India — Art. 20(3) — Right against self-incrimination
— Incriminatory statement — How to ascertain whether statement is incriminatory — Depends upon the use to which it is put — Direct use, derivative use and transactional use of statement also explained — Evidence Act, 1872 — Ss. 24 to 27 — Criminal Procedure Code, 1973 — S. 162
- c Held :
- Where a person in custody is compelled to reveal information which aids investigation efforts, the information so revealed can prove to be incriminatory in the following ways: (1) statements made in custody could be directly relied upon by prosecution to strengthen their case. However, if it is shown that such statements were made under circumstances of compulsion, they will be excluded from evidence. (2) Another possibility is that of “derivative use” i.e. when information revealed during questioning leads to discovery of independent materials, thereby furnishing a link in the chain of evidence gathered by investigators. (3) Yet another possibility is that of “transactional use” i.e. when information revealed can prove to be helpful for investigation and prosecution in cases other than the one being investigated. (4) A common practice is that of extracting materials or information, which are then compared with materials that are already in the possession of investigators. For instance, handwriting samples and specimen signatures are routinely obtained for the purpose of identification or corroboration. (Para 128)
- d *Nandini Satpathy v. P.L. Dani*, (1978) 2 SCC 424 : 1978 SCC (Cri) 236; *Hoffman v. United States*, 95 L Ed 1118 : 341 US 479 (1950); *State of Bombay v. Kathi Kalu Oghad*, AIR 1961 SC 1808 : (1961) 2 Cri LJ 856 : (1962) 3 SCR 10. *relied on*
- f E. Constitution of India — Art. 20(3) — Right against self-incrimination
— Compulsory administration of narcoanalysis, polygraph and BEAP tests
— Whether tests should be permitted on the premise that it is not known at the time of conducting of tests whether test subject would make inculpatory or exculpatory statement — Held, distinction whether the statement is inculpatory or exculpatory is made at the trial stage whereas right to remain silent has to be exercised at the stage of investigation — Such right would be impaired if test subject first undergoes test and then it is decided whether his statement is inculpatory or exculpatory — Criminal Trial — Proof — Inculpatory/Exculpatory evidence (Paras 138 and 139)
- g F. Evidence Act, 1872 — Ss. 24 to 26 — Right against self-incrimination
— Exclusion of statement obtained by compulsive means — Held, only inculpatory statement stands excluded — Criminal Trial — Proof — Inculpatory/Exculpatory evidence (Paras 138 and 139)
- h

G. Constitution of India — Art. 20(3) — Right against self-incrimination — Reasons for procedural safeguards like warning to be given to accused about his right to remain silent, etc. — Held, this is done to mitigate disadvantages faced by suspect in custodial environment — He should be made to understand fully contents of warning — Basis of development of law on this aspect in USA also explained — Held, the protection in USA is outcome of inter-relation between Fifth (privilege against self-incrimination) and Fourteenth Amendments (due process of law) and Fourth Amendment (protection against unreasonable searches and seizures) in US Constitution — Constitution of United States of America — Fourth, Fifth and Fourteenth Amendments (Paras 117 and 119)

Miranda v. Arizona, 16 L Ed 2d 694 : 384 US 436 (1965); *Escobedo v. Illinois*, 12 L Ed 2d 977 : 378 US 478 (1963), *relied on*

79 Harvard Law Review 21, 37 (1965), *relied on*

H. Constitution of India — Art. 20(3) — Right against self-incrimination — Administrative and quasi-criminal proceedings — Applicability of right to such proceedings and stage from which applicable — Held, right becomes available when a person has been formally accused (Para 125)

I. Constitution of India — Art. 20(3) — Right against self-incrimination — Its status in the Constitution — Held, it has an exalted status (Para 90)

J. Constitution of India — Art. 20(3) — Right against self-incrimination — Comparison of right under Art. 20(3) and under Ss. 161(2), 313(3) and 315(1) proviso, CrPC — Protection under S. 161(2), held, is wider than that under Art. 20(3) — Formal accusation is necessary to attract Art. 20(3) whereas S. 161(2) r/w S. 161(1) CrPC protects suspects and witnesses also, subject to obligation of witness under S. 132, Evidence Act to answer questions in suit or proceedings — Further held, protection afforded to witness is narrower compared to protection afforded to accused during trial under Ss. 313(3) and 315(1) proviso (b) CrPC — Criminal Procedure Code, 1973 — Ss. 161(2), 161(1), 313(3) and 315(1) proviso (b) — Evidence Act, 1872 — S. 132 proviso — Criminal Trial — Witnesses (Paras 121 to 123)

M.P. Sharma v. Satish Chandra, AIR 1954 SC 300 : 1954 Cri LJ 865 : 1954 SCR 1077;

State of Bombay v. Kathi Kalu Oghad, AIR 1961 SC 1808 : (1961) 2 Cri LJ 856 : (1962) 3 SCR 10; *Miranda v. Arizona*, 16 L Ed 2d 694 : 384 US 436 (1965), *relied on*

Escobedo v. Illinois, 12 L Ed 2d 977 : 378 US 478 (1963), *referred to*

79 Harvard Law Review 21, 37 (1965), *referred to*

Raja Narayanlal Bansilal v. Maneck Phiroz Mistry, AIR 1961 SC 29 : (1961) 1 SCR 417;

Ramesh Chandra Mehta v. State of W.B., AIR 1970 SC 940 : 1970 Cri LJ 863 : (1969) 2 SCR 461; *Balkishan A. Devidayal v. State of Maharashtra*, (1980) 4 SCC 600 : 1981 SCC (Cri) 62, *relied on*

K. Constitution of India — Art. 20(3) — Right against self-incrimination under Art. 20(3) vis-à-vis theory of confirmation by subsequent facts, as incorporated in S. 27, Evidence Act, 1872 — Held, right against self-incrimination arises when incriminating statement is made out of compulsion — In the absence of compulsion, information received from accused in custody can be proved under S. 27, Evidence Act — Further held, there is no automatic presumption in India that custodial statement has been extracted through compulsion — There is therefore no requirement of additional diligence similar to *Miranda* warnings in USA — Evidence Act, 1872 — Ss. 24 to 27 — Criminal Procedure Code, 1973 — Ss. 162, 163 and 164 — Criminal Trial — Investigation — *Miranda* Warnings (USA) — Inapplicability in India (Paras 133 and 134)

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State of Bombay v. Kathi Kalu Oghad, AIR 1961 SC 1808 : (1961) 2 Cri LJ 856 : (1962) 3 SCR 10, *followed*

Miranda v. Arizona, 161 F.2d 694 : 384 US 436 (1965), *limited*

- a L. Constitution of India — Arts. 20(3) and 21 — Right against self-incrimination — If applicable when a person who is co-accused is offered immunity from prosecution in return for cooperating with investigators — Held, not directly applicable — Evidence Act, 1872 — S. 30 — Criminal Trial — Approver — Self-incrimination

Held:

- b The situation that compulsory administration of the impugned tests can prove to be useful in instances where the cooperating witness has difficulty in remembering relevant facts or is wilfully concealing crucial details, could arise when a person who is a co-accused is offered immunity from prosecution in return for cooperating with investigators. Even though right against self-incrimination is not directly applicable in such situations, relevant legal enquiry
c is whether compulsory administration of the impugned tests meets requisite standard of substantive due process for placing restraints on personal liberty.
(Para 140)

- d M. Constitution of India — Art. 20(3) — Kinds of evidence and their admissibility — Three kinds of evidence, namely, oral, documentary and material — Oral evidence — Compulsory extraction of — Held, is prohibited by Art. 20(3) r/w S. 161(2) CrPC — Documentary evidence — Admissibility of — Held, is decided by trial court but parties are obliged to produce it — Material or physical evidence — Compulsory extraction of — Held, is not hit by Art. 20(3) — Compulsory extraction of oral or written evidence is also permissible if it is to be used for identification or comparison with material and information already in possession of investigators — Criminal Procedure Code, 1973 — Ss. 161, 53, 53-A and 54
e — Evidence Act, 1872 — Ss. 3, 5, 24 to 27 and 59 to 65 — Criminal Trial — Proof
(Para 179)

- f N. Constitution of India — Arts. 21 and 20(3) — Right to personal liberty — Scope — Validity of narcoanalysis, polygraph and BEAP tests — Wider perspective of personal liberty, held, is required to cover situations not specifically covered by Art. 20(3) — Undesirable effects of these tests in certain situations are not taken care of by Art. 20(3) and therefore validity of these tests is to be examined from wider perspective of personal liberty under Art. 21, which includes right to mental privacy, right against cruel, inhuman and degrading treatment and right to fair trial — Mere fact that use of reasonable force in exercise of police power and taking of samples of bodily substances (like hair, blood, etc.) is permissible in law, does not necessarily mean that narcoanalysis, polygraph and BEAP tests should also
g be permitted without examining their effect on test subject's rights under Art. 21 — Criminal Procedure Code, 1973, Ss. 53, 53-A and 54
(Paras 190 to 196 and 203)

Rochin v. California, 96 L Ed 183 : 342 US 165 (1951), *relied on*

State of Maharashtra v. Sheshappa Dudhappa Tambade, AIR 1964 Bom 253; *Breithaupt v. Abram*, 1 L Ed 2d 448 : 352 US 432 (1956); *Jamshed v. State of U.P.*, 1976 Cri LJ 1680

- (All); *Ananth Kumar Naik v. State of A.P.*, 1977 Cri LJ 1797 (AP); *Anil Anant Rao Lokhande v. State of Maharashtra*, 1981 Cri LJ 125 (Bom), *approved*

Brown v. Mississippi, 80 L Ed 682 : 297 US 278 (1935), *referred to*

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SUPREME COURT CASES

(2010) 7 SCC

O. Constitution of India — Arts. 21 and 20(3) — Right to privacy — Basis, scope and extent — Privacy as an aspect of personal liberty — Mental privacy and physical privacy — Held, while physical privacy may be curtailed to some extent in reasonable exercise of police powers under CrPC, there is no corresponding provision for intruding upon a person's mental privacy — Extracting testimonial responses by means of narcoanalysis, polygraph and BEAP tests, held, intrude upon a person's mental privacy and are therefore impermissible in law — Protection of mental privacy is available to accused as well as to victim of an offence — A female who alleges to be victim of sexual offence cannot be subjected to polygraph test to ascertain whether she is making truthful allegation — Evidence Act, 1872 — Ss. 24 to 27 and 114-A — Criminal Procedure Code, 1973 — S. 164-A — Criminal Law — Laboratory Procedure Manual for Polygraph Examination — Para 3.4(v) — European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950 — Art. 8 — Police and Criminal Evidence Act, 1984 (UK), S. 64(1-A)

Held :

A distinction must be made between the character of restraints placed on the right to privacy. While ordinary exercise of police powers contemplates restraints of a physical nature such as extraction of bodily substances and use of reasonable force for subjecting a person to a medical examination, it is not viable to extend these police powers to forcible extraction of testimonial responses. In conceptualising right to privacy, distinction between privacy in a physical sense and the privacy of one's mental processes, has to be kept in view. (Para 224)

So far, judicial understanding of privacy in India has mostly stressed on protection of body and physical spaces from intrusive actions by the State. While the scheme of criminal procedure as well as evidence law mandates interference with physical privacy through statutory provisions that enable arrest, detention, search and seizure among others, the same cannot be the basis for compelling a person to impart personal knowledge about a relevant fact. Theory of interrelationship of rights mandates that right against self-incrimination should also be read as a component of personal liberty under Article 21. Hence, understanding of right to privacy should account for its intersection with Article 20(3). Furthermore, rule against involuntary confessions as embodied in Sections 24, 25, 26 and 27 of the Evidence Act, 1872 seeks to serve both the objectives of reliability as well as voluntariness of testimony given in a custodial setting. A conjunctive reading of Articles 20(3) and 21 of the Constitution along with the principles of evidence law leads to a clear answer. Importance of personal autonomy must be recognised in aspects such as choice between remaining silent and speaking. An individual's decision to make a statement is the product of a private choice and there should be no scope for any other individual to interfere with such autonomy, especially in circumstances where the person faces exposure to criminal charges or penalties. (Para 225)

M.P. Sharma v. Satish Chandra, AIR 1954 SC 300 : 1954 Cri LJ 865 : 1954 SCR 1077; *Kharak Singh v. State of U.P.*, AIR 1963 SC 1295 : (1963) 2 Cri LJ 329; *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248 : AIR 1978 SC 597; *Gobind v. State of M.P.*, (1975) 2 SCC 148 : 1975 SCC (Cri) 468; *R. Rajagopal v. State of T.N.*, (1994) 6 SCC 632; *People's Union for Civil Liberties v. Union of India*, (1997) 1 SCC 301; *'X' v. Hospital 'Z'*, (2003) 1 SCC 500; *Attorney General's Reference (No. 3 of 1999)*, (2001) 2 AC 91 : (2001) 2 WLR 56 : (2001) 1 All ER 577 (HL), *relied on*

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M. Vijaya v. Singareni Collieries Co. Ltd., AIR 2001 AP 502; *R.(S) v. Chief Constable of the South Yorkshire Police*, (2002) 1 WLR 3223 : (2003) 1 All ER 148 (CA). *approved*

'X' v. Hospital 'Z', (1998) 8 SCC 296. *held, partly overruled*

a 94 Journal of Criminal Law and Criminology 243-293 (2004). *relied on*

Medical test for ascertaining mental condition of a person is most likely to be in the nature of a psychiatric evaluation which usually includes testimonial responses. Subjecting a person to the impugned techniques (narcoanalysis, lie-detector and BEAP tests) in an involuntary manner violates prescribed boundaries of privacy. Forcible interference with a person's mental processes is not provided for under any statute and it most certainly comes into conflict with right against self-incrimination. However, this determination does not account for circumstances where a person could be subjected to any of the impugned tests but not exposed to criminal charges and the possibility of conviction. In such cases, he/she could still face adverse consequences such as custodial abuse, surveillance, undue harassment and social stigma among others. In order to address such circumstances, it is important to examine some other dimensions of Article 21. (Paras 204 and 226)

d There is possibility that victims of offences could be forcibly subjected to any of these techniques during the course of investigation. There is provision in *Laboratory Procedure Manual* for polygraph tests which contemplates the same for ascertaining the testimony of victims of sexual offences. Irrespective of the need to expedite investigations in such cases, no person who is a victim of an offence can be compelled to undergo any of the tests in question. Such a forcible administration would be an unjustified intrusion into mental privacy and could lead to further stigma for the victim. (Para 254)

e P. Constitution of India — Art. 21 — Right against cruel, inhuman and degrading treatment — Right to dignity — Right against mental torture — Whether such right violated by narcoanalysis, polygraph and BEAP tests — Held, these tests are methods of interrogation which impair test subject's decision-making capacity, which is an affront to human dignity and liberty — Moreover, incriminating test results may prompt investigating agencies to inflict mental pain on test subject — Such a treatment is violative of Art. 21 — Impugned tests cannot also be permitted on the reasoning that infliction of some pain or suffering is unavoidable in practice of medicine and that law also permits it in the form of punishments which are prescribed for various offences — Held, society governed by rules and liberal values have to make rational distinction between various circumstances where pain or suffering is to be permitted or to be prohibited — Universal Declaration of Human Rights, 1948 — Art. 5 — International Covenant on Civil and Political Rights, 1966 — Art. 7 — U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984 — Arts. 1 and 16 — g U.N. Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment, 1988 — Principles 1, 6 and 21 — Geneva Convention Relative to the Treatment of Prisoners of War, 1949 — Art. 17 — Narcoanalysis — Polygraph/Lie-detector test — BEAP/P300 waves test — Evidence Act, 1872 — Ss. 24 to 26

Held :

h During narcoanalysis, the test subject loses awareness of place and passing of time. All the three impugned techniques (narcoanalysis, lie-detector and

BEAP tests) can be described as methods of interrogation which impair test subject's capacity of decision or judgment. Compulsory administration of impugned techniques constitutes cruel, inhuman or degrading treatment in the context of Article 21. Law disapproves involuntary testimony, irrespective of the nature and degree of coercion, threats, fraud or inducement used to elicit the same. The popular perceptions of terms such as "torture" and "cruel, inhuman or degrading treatment" are associated with gory images of blood-letting and broken bones. However, it has to be recognised that forcible intrusion into a person's mental processes is also an affront to human dignity and liberty, often with grave and long-lasting consequences. (Paras 244, 239 to 242 and 245) a

Marcy Strauss, 'Criminal Defence in the Age of Terrorism — Torture'. *quoted* b

Sunil Batra v. Delhi Admn., (1978) 4 SCC 494 : 1979 SCC (Cri) 155; *Rustom Cavasjee*

Cooper v. Union of India, (1970) 1 SCC 248; *Maneka Gandhi v. Union of India*, (1978) 1

SCC 248; *D.K. Basu v. State of W.B.*, (1997) 1 SCC 416 : 1997 SCC (Cri) 92. *relied on*

20 American University International Law Review 521-612 (2005). *quoted*

48 New York Law School Law Review 201-274 (2003/2004). *quoted*

Q. Constitution of India — Art. 21 — Right to fair trial — Facets of —
Held, right is violated in compulsory administration of narcoanalysis, polygraph and BEAP tests on account of following reasons, c

— (i) access to legal advice, which is an essential component of right to fair trial, is rendered meaningless because test subject has no control over his verbal or physiological responses,

— (ii) test subject may not be able to defend himself effectively because results of tests may be used against him but may not be communicated to him in time, d

— (iii) reliability of these tests is questionable and therefore proof beyond reasonable doubt, which is an essential feature of criminal trial, may not be possible through these tests,

— (iv) credibility of so-called experts who administer these tests, is also doubtful, e

— (v) trial Judge who presides at evidentiary as well trial phases, may be prejudiced by results of these tests even if tests may not be admitted in evidence,

— (vi) test results, in some cases have resulted in public pressure, particularly when test results are inculpatory, which is not desirable in the interest of fair trial, f

— (vii) tests disturb parity of procedural safeguards between prosecution and defence; if prosecution is to be allowed to conduct these tests, similar demand from accused or witnesses has also to be conceded,

— (viii) tests have potential of increasing frivolous litigation by demanding fresh proceedings and conducting of tests — **Criminal Trial — Media trial — Misuse of forensic test results** (Paras 247 to 253) g

R. v. Beland, (1987) 36 CCC 3d 481 : (1987) 2 SCR 398 (Can SC). *relied on*

United States v. Scheffer, 140 L Ed 2d 413 : 523 US 303 (1998). *relied on*

R. Constitution of India — Arts. 21 and 20(3) — Personal liberty — Wider dimensions of — Non-penal consequences like custodial violence, increased police surveillance and harassment — Held, such vices though not covered by protective shield of Art. 20(3) and S. 161(2) CrPC, yet are h

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- prohibited by Art. 21 — One of the reasons for declaring narcoanalysis, polygraph and BEAP tests as invalid is that a test subject who refuses to undergo these tests may be exposed to such non-penal consequences —
- a Criminal Procedure Code, 1973 — S. 161(2) (Paras 143 and 144)
- Sunil Batra v. Delhi Admn.*, (1978) 4 SCC 494 : 1979 SCC (Cri) 155, *relied on*
- S. Constitution of India — Art. 21 and Pt. III — Constitutional values, held, have to be infused in all branches of law including procedural areas such as law of evidence (Para 111)
- Rochin v. California*, 96 L Ed 183 : 342 US 165 (1951), *relied on*
- b T. Constitution of India — Arts. 20(3) and 21 — Right against self-incrimination — Right to fair trial — Inter-relation between the two rights — Held, the inter-relation is recognised in most jurisdictions — In India too, Art. 20(3) has to be interpreted as a facet of the wider right of personal liberty under Art. 21 — Right of refusal to answer questions that may incriminate a person, is a procedural safeguard which bears close
- c relation with the right to fair trial under Art. 21 (Paras 87, 88 and 92)
- Maneka Gandhi v. Union of India*, (1978) 1 SCC 248; *Rochin v. California*, 96 L Ed 183 : 342 US 165 (1951), *relied on*
- U. Constitution of India — Arts. 20(3) and 21 — Right against self-incrimination and right to personal liberty — Exceptions if can be created by court in public interest — Whether court should permit
- d compulsory administration of narcoanalysis, polygraph and BEAP tests on the ground that public interest would be served in the following situations (i) tests may become necessary in emergency as in the case of likely terrorist attack, (ii) tests would prevent police from resorting to third-degree methods, and (iii) selective use of tests can be resorted to, in case of heinous offences only — Held, rights under Arts. 20(3) and 21 have been given
- e non-derogable status and therefore cannot be compromised on the ground of so-called public interest — Moreover, grounds of public interest projected in this case do not have sound basis — This is because tests are a gradually unfolding process which require time as well as expertise — Their results cannot be obtained on emergent basis — Use of third-degree methods by police, though deplorable, cannot be taken as a reason for permitting these
- f tests because tests themselves are constitutionally impermissible and therefore one vice cannot be substituted by another — There is also no certainty that tests, once permitted, would be put to selective use in case of heinous offences only and not progress down a slippery slope — Besides, permitting such qualified use would amount to law-making by court which is outside the judicial domain — Constitutional values, which are meant for whole of India and for future generations, have to be preserved irrespective of individual cases wherein some hardened criminals who have no regard
- g for societal values, may be benefited by court ruling in this case
- V. Constitution of India — Pt. III — Public interest — Whether overrides constitutional guarantees/freedoms
- W. Constitution of India — Arts. 32, 226 and 136 — Constitutional adjudication — Scope and ambit — Factors involved — Practical considerations, future generations and personal sensibilities of Judges —
- h Balancing of — Judiciary

Held :

Ordinarily it is the task of legislature to arrive at a pragmatic balance between often competing interests of personal liberty and public safety. The Supreme Court as a constitutional court can only seek to preserve balance between these competing interests as reflected in the text of the Constitution and its subsequent interpretation. There is absolutely no ambiguity on the status of principles such as the right against self-incrimination and various dimensions of personal liberty. Rights guaranteed in Articles 20 and 21 of the Constitution have been given a non-derogable status and they are available to citizens as well as foreigners. It is not within the competence of judiciary to create exceptions and limitations on the availability of these rights. (Paras 256 to 259)

57 Stanford Law Review 209-255 (October 2004); 39 Loyola University Chicago Law Journal 329-360 (Winter 2008), *quoted*

Even though the main task of constitutional adjudication is to safeguard core organising principles of Indian polity, there are certain practical concerns that strengthen the case against involuntary administration of the tests in question. (Para 257)

One of the main functions of constitutionally prescribed rights is to safeguard interests of citizens in their interactions with the Government. As guardians of these rights, the Court will be failing in its duty if the Court permits any citizen to be forcibly subjected to the tests in question. One could argue that some of the parties who will benefit from this decision are hardened criminals who have no regard for societal values. However, it must be borne in mind that in constitutional adjudication the Court's concerns are not confined to the facts at hand but extend to implications of Court's decision for the whole population as well as future generations. (Para 260)

Sometimes there are apprehensions about Judges imposing their personal sensibilities through broadly worded terms such as "substantive due process", but in this case Court's inquiry has been based on a faithful understanding of principles entrenched in the Constitution. (Para 261)

Public Committee Against Torture in Israel v. State of Israel, (1999) 7 BHRC 31 : HC 5100/94 (1999) (SC of Israel), *relied on*

X. Constitution of India — Arts. 20, 21, 32 and 359 — Non-derogable status of Arts. 20 and 21 — Held, right to move court for enforcement of rights conferred by Arts. 20 and 21 cannot be suspended even during Emergency, by virtue of Art. 359 — Rights under Arts. 20 and 21 therefore have a non-derogable status (Para 89)

Y. Constitution of India — Arts. 20(3) and 21 — Right to fair trial — Facets — Right against self-incrimination, right to be represented by a lawyer and right to compulsory process — Historical basis of the said rights explained — Magna Carta — Petition of Right, 1628 (English) — Treason Act, 1695 (c. 3) (English) — Justices Protection Act, 1848 (English) (Paras 92 to 100)

Z. Criminology — Criminal Jurisprudence — Standards of — Protections afforded to accused such as presumption of innocence, right to counsel, right to be informed of charges, right to compulsory process, proof beyond reasonable doubt, etc., held, have been evolved as standards of criminal jurisprudence (Paras 92 to 100)

- ZA. Constitution of India — Arts. 20(3) and 21 — Right against self-incrimination — Right to counsel — Inter-relationship between rights — Segregation between testimonial function performed by accused and defensive function performed by lawyer — Right to remain silent, held, became meaningful after right to counsel was recognised — Said segregation is an essential feature of fair trial so as to ensure level playing field between prosecution and defence (Para 100)
- a 84(1) Political Science Quarterly 1-29 (March 1969), *quoted*
92(5) Michigan Law Review 1047-1085 (March 1994), *quoted*
- b *Nandini Satpathy v. P.L. Dani*, (1978) 2 SCC 424 : 1978 SCC (Cri) 236; *Brown v. Walker*, 40 L Ed 819 : 161 US 591 (1895); *Miranda v. Arizona*, 16 L Ed 2d 694 : 384 US 436 (1965), *relied on*
- c ZB. Criminal Procedure Code, 1973 — S. 53 Expln. (a) [as substituted by 2005 Amendment] — Tests which can be conducted on accused — Whether narcoanalysis, polygraph and BEAP tests covered by general expression “such other tests” occurring in Expln. (a) — Held, general expression, which comes after specific tests enumerated in Expln. (a), has to be interpreted by applying principle of *ejusdem generis* — Specific tests include examination of bodily substances and therefore general expression cannot be construed to include tests which reveal testimonial responses — Besides, Parliament while amending Expln. (a) in 2005 was presumed to be aware of latest techniques yet did not include narcoanalysis, polygraph and
- d BEAP tests — These tests are therefore not covered by expression “such other tests” (Paras 169 to 173)
- e ZC. Interpretation of Statutes — Basic rules — Legislative intention — Inquiry into — Impracticability — Held, while it is open to courts to examine legislative history, it is not proper for court to try and conclusively ascertain legislative intent — Such an inquiry is impracticable because court does not have access to all materials which would have been considered by legislature (Para 170)
- Thogorani v. State of Orissa*, 2004 Cri LJ 4003 (Ori), *approved*
Bhondar v. Emperor, AIR 1931 Cal 601; *Deomam Shamji Patel v. State of Maharashtra*, AIR 1959 Bom 284, *referred to*
Sharda v. Dharmpal, (2003) 4 SCC 493, *discussed*
- f *Due Process and the American Criminal Trial*, 38 Australian Law Journal 223, 231 (1964), *referred to*
Royal College of Nursing of the United Kingdom v. Dep't. of Health and Social Security, 1981 AC 800 : (1981) 2 WLR 279 : (1981) 1 All ER 545 (HL); *Senior Electric Inspector v. Laxminarayan Chopra*, AIR 1962 SC 159, *relied on*
G.P. Singh: *Principles of Statutory Interpretation*, 10th Edn. (2006) at pp. 239-47, *quoted*
Sharda v. Dharmpal, (2003) 4 SCC 493, *relied on*
- g *Mahipal Maderna v. State of Rajasthan*, 1971 Cri LJ 1405 (Raj); *Jamshed v. State of U.P.*, 1976 Cri LJ 1680 (All), *discussed*
United Nations General Assembly, “Principles of Medical Ethics relevant to the role of health personnel, particularly physicians, in the protection of prisoners and detainees against torture, and other cruel, inhuman or degrading treatment of punishment” [GA Res 37/194, 111th Plenary Meeting on 18-12-1982], *referred to*
- h ZD. Criminal Procedure Code, 1973 — S. 53 Expln. (a) — Compulsory medical examination — Use of reasonable force — Permissibility

Held :

Medical examination of an arrested person can be directed during the course of an investigation either at the instance of the investigating officer or arrested person himself. It is also within the powers of a court to direct such a medical examination on its own. Medical examination can also be directed in respect of a person who has been released from custody on bail as well as a person who has been granted anticipatory bail. Section 53 which contemplates use of "force as is reasonably necessary" for conducting a medical examination implies that once a court has directed medical examination of a particular person it is within the powers of investigators and examiners to resort to a reasonable degree of physical force for conducting the same. (Para 166)

ZE. Criminal Procedure Code, 1973 — S. 53 Expln. (a) — DNA profile and DNA sample — Difference between — Explained — Uses of DNA profile also indicated

Held :

DNA profiling technique has been expressly included among various forms of medical examination in amended Explanation to Section 53 CrPC. DNA profile is different from a DNA sample which can be obtained from bodily substances. A DNA profile is a record created on the basis of DNA samples made available to forensic experts. Creating and maintaining DNA profiles of offenders and suspects are useful practices since newly obtained DNA samples can be readily matched with existing profiles that are already in the possession of law-enforcement agencies. Matching of DNA samples is emerging as a vital tool for linking suspects to specific criminal acts. (Para 220)

ZF. Criminal Procedure Code, 1973 — S. 161(2) — Right to remain silent — Scope of protection under S. 161(2) — Whether protection available in non-criminal proceedings also — Held, protection flows from provisions of CrPC and is therefore available in proceedings under CrPC — Non-criminal proceedings, even though resulting in some punitive action are not covered — Evidence Act, 1872 — Ss. 21 and 23 — Constitution of India — Art. 20(3)

Held :

Since extension of the right against self-incrimination to suspects and witnesses has its basis in Section 161(2) CrPC, it is not readily available to persons who are examined during proceedings that are not governed by CrPC. There is a distinction between proceedings of a purely criminal nature and those proceedings which can culminate in punitive remedies and yet cannot be characterised as criminal proceedings. Ordinarily Article 20(3) cannot be invoked by witnesses during proceedings that cannot be characterised as criminal proceedings. In administrative and quasi-criminal proceedings, the protection of Article 20(3) becomes available only after a person has been formally accused of committing an offence. (Para 125)

Raja Narayanlal Bansilal v. Maneck Phiroz Mistry, AIR 1961 SC 29 : (1961) 1 SCR 417;
Ramesh Chandra Mehta v. State of W.B., AIR 1970 SC 940 : 1970 Cri LJ 863 : (1969) 2 SCR 461; *Balkishan A. Devidayal v. State of Maharashtra*, (1980) 4 SCC 600 : 1981 SCC (Cri) 62, *relied on*

ZG. Criminal Procedure Code, 1973 — Ss. 313(3), 315(1) proviso (b) and 161(2) — Rule against adverse inference from silence of accused at trial — Held, the rule flows from combined reading of CrPC provisions and Art. 20(3) — Constitution of India — Art. 20(3) — Evidence Act, 1872 — S. 114 Ill. (g)

Held :

- a Indian law incorporates the rule against adverse inferences from silence which is operative at trial stage. This position is embodied in a conjunctive reading of Article 20(3) of the Constitution and Sections 161(2), 313(3) and proviso (b) of Section 315(1) CrPC. Even though an accused is a competent witness in his/her own trial, he/she cannot be compelled to answer questions that could expose him/her to incrimination and the trial Judge cannot draw adverse inferences from refusal to do so. This position is cemented by prohibiting any of the parties from commenting on the failure of the accused to give evidence.

(Para 141)

Woolmington v. Director of Public Prosecutions, 1935 AC 462 : 1935 All ER Rep 1 (HL),
relied on

180th Report of the Law Commission of India (May 2002). quoted

- c ZH. Criminal Procedure Code, 1973 — Ss. 39, 156(1), 161(1), 161(2), 313(3) and 315(1) proviso (b) — Citizens' cooperation in criminal investigation vis-à-vis right against self-incrimination — Right guaranteed by Art. 20(3) against self-incrimination, held, has overriding effect — Provisions contained in Ss. 39, 156(1) and 161(1) CrPC are subject to right against self-incrimination — No adverse inference can be drawn against an accused who chooses to remain silent — Constitution of India — Art. 20(3) — Right against self-incrimination — Scope — Persons covered

(Paras 90 and 91)

- d ZI. Evidence Act, 1872 — Ss. 24, 25 and 26 — Statements made by a person in custody — Unreliability of statement — Reasons for unreliability indicated — Doctrine of "excluding the fruit of a poisonous tree", held, is incorporated in Ss. 24 to 26 — Criminal Procedure Code, 1973 — Ss. 161(2), 313(3), 315 proviso (b)

e *Held :*

Statements made in custody are considered to be unreliable unless they have been subjected to cross-examination or judicial scrutiny. Scheme created by the Code of Criminal Procedure and the Evidence Act also mandates that confessions made before police officers are ordinarily not admissible as evidence and it is only statements made in the presence of a Judicial Magistrate which can be given weightage. The doctrine of "excluding the fruit of a poisonous tree" has been incorporated in Sections 24, 25 and 26 of the Evidence Act, 1872.

(Para 132)

- g ZJ. Medical Practice and Practitioners — Medical ethics — Doctor-patient privilege — Exceptions — Use of medical knowledge in criminal investigation — Held, is permissible within certain limits — Testimonial acts such as results of psychiatric examination cannot however be used in evidence without subject's informed consent — Criminal Procedure Code, 1973 — S. 53 Expln. (a) — Medical Jurisprudence — Toxicology — Principles of medical ethics relevant to the role of health personnel, particularly physicians, in the protection of prisoners and detainees against torture, and other cruel, inhuman or degrading treatment or punishment —

h U.N. Principles of Medical Ethics, 1982, Principle 4 (Para 178)

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ZK. International Law — International Conventions — U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984 — Domestic court if bound — Held, though India is signatory to this Convention yet it has not been ratified by Parliament nor has any corresponding legislation been enacted under Art. 253 — Domestic court therefore not absolutely bound by Convention but it has significant persuasive value because it represents evolving international consensus on human rights norms — Constitution of India — Art. 253 (Para 236)

K-D/46217/CR

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The Judgment of the Court was delivered by

K.G. BALAKRISHNAN, C.J.— Leave granted in SLPs (Crl.) Nos. 10 of 2006 and 6711 of 2007.

2. The legal questions in this batch of criminal appeals relate to the involuntary administration of certain scientific techniques, namely, narcoanalysis, polygraph examination and the Brain Electrical Activation Profile (BEAP) test for the purpose of improving investigation efforts in criminal cases. This issue has received considerable attention since it involves tensions between the desirability of efficient investigation and the preservation of individual liberties. Ordinarily, the judicial task is that of evaluating the rival contentions in order to arrive at a sound conclusion. However, the present case is not an ordinary dispute between private parties. It raises pertinent questions about the meaning and scope of the fundamental rights which are available to all citizens. Therefore, we must examine the implications of permitting the use of the impugned techniques in a variety of settings.

3. Objections have been raised in respect of instances where individuals who are the accused, suspects or witnesses in an investigation have been subjected to these tests without their consent. Such measures have been defended by citing the importance of extracting information which could help the investigating agencies to prevent criminal activities in the future as well as in circumstances where it is difficult to gather evidence through ordinary means.

4. In some of the impugned judgments, reliance has been placed on certain provisions of the Code of Criminal Procedure, 1973 and the Evidence Act, 1872 to refer back to the responsibilities placed on citizens to fully cooperate with the investigating agencies. It has also been urged that administering these techniques does not cause any bodily harm and that the extracted information will be used only for strengthening investigation efforts and will not be admitted as evidence during the trial stage. The assertion is that improvements in fact finding during the investigation stage will consequently help to increase the rate of prosecution as well as the rate of acquittal. Yet another line of reasoning is that these scientific techniques are a softer alternative to the regrettable and allegedly widespread use of “third-degree methods” by investigators.

5. The involuntary administration of the impugned techniques prompts questions about the protective scope of the “right against self-incrimination” which finds place in Article 20(3) of our Constitution. In one of the impugned judgments, it has been held that the information extracted through methods such as “polygraph examination” and the “Brain Electrical Activation Profile (BEAP) test” cannot be equated with “testimonial compulsion” because the test subject is not required to give verbal answers, thereby falling outside the protective scope of Article 20(3). It was further ruled that the verbal revelations made during a narcoanalysis test do not attract the bar of Article 20(3) since the inculpatory or exculpatory nature of these revelations is not known at the time of conducting the test.

6. To address these questions among others, it is necessary to inquire into the historical origins and rationale behind the “right against self-incrimination”. The principal questions are whether this right extends to the investigation stage and whether the test results are of a “testimonial” character, thereby attracting the protection of Article 20(3). Furthermore, we must examine whether relying on the test results or materials discovered with the help of the same creates a reasonable likelihood of incrimination for the test subject.

7. We must also deal with the arguments invoking the guarantee of “substantive due process” which is part and parcel of the idea of “personal liberty” protected by Article 21 of the Constitution. The first question in this regard is whether the provisions in the Code of Criminal Procedure, 1973 that provide for “medical examination” during the course of investigation can be read expansively to include the impugned techniques, even though the latter are not explicitly enumerated. To answer this question, it will be necessary to discuss the principles governing the interpretation of statutes in light of scientific advancements. Questions have also been raised with respect to the professional ethics of the medical personnel involved in the administration of these techniques. Furthermore, Article 21 has been judicially expanded to include a “right against cruel, inhuman or degrading treatment”, which requires us to determine whether the involuntary administration of the impugned techniques violates this right whose scope corresponds with evolving international human rights norms. We must also

consider contentions that have invoked the test subject's "right to privacy", both in a physical and mental sense.

8. The scientific validity of the impugned techniques has been questioned and it is argued that their results are not entirely reliable. For instance, the narcoanalysis technique involves the intravenous administration of sodium pentothal, a drug which lowers inhibitions on the part of the subject and induces the person to talk freely. However, empirical studies suggest that the drug-induced revelations need not necessarily be true. Polygraph examination and the BEAP test are methods which serve the respective purposes of lie detection and gauging the subject's familiarity with information related to the crime. These techniques are essentially confirmatory in nature, wherein inferences are drawn from the physiological responses of the subject. However, the reliability of these methods has been repeatedly questioned in empirical studies. In the context of criminal cases, the reliability of scientific evidence bears a causal link with several dimensions of the right to a fair trial such as the requisite standard of proving guilt beyond reasonable doubt and the right of the accused to present a defence. We must be mindful of the fact that these requirements have long been recognised as components of "personal liberty" under Article 21 of the Constitution. Hence it will be instructive to gather some insights about the admissibility of scientific evidence.

9. In the course of the proceedings before this Court, oral submissions were made by Mr Rajesh Mahale, Advocate (Criminal Appeal No. 1267 of 2004), Mr Manoj Goel, Advocate (Criminal Appeals Nos. 56-57 of 2005), Mr Santosh Paul, Advocate (Criminal Appeal No. 54 of 2005) and Mr Harish Salve, Senior Advocate (Criminal Appeals Nos. 1199 of 2006 and 1471 of 2007)—all of whom argued against the involuntary administration of the impugned techniques.

10. Arguments defending the compulsory administration of these techniques were presented by Mr Goolam E. Vahanvati, Solicitor General of India [now Attorney General for India] and Mr Anoop G. Chaudhari, Senior Advocate who appeared on behalf of the Union of India. These were further supported by Mr T.R. Andhyarujina, Senior Advocate who appeared on behalf of the Central Bureau of Investigation (CBI) and Mr Sanjay Hegde, Advocate who represented the State of Karnataka. Mr Dushyant Dave, Senior Advocate, rendered assistance as amicus curiae in this matter.

11. At this stage, it will be useful to frame the questions of law and outline the relevant sub-questions in the following manner:

I. Whether the involuntary administration of the impugned techniques violates the "right against self-incrimination" enumerated in Article 20(3) of the Constitution?

I-A. Whether the investigative use of the impugned techniques creates a likelihood of incrimination for the subject?

I-B. Whether the results derived from the impugned techniques amount to "testimonial compulsion" thereby attracting the bar of Article 20(3)?

- a II. Whether the involuntary administration of the impugned techniques is a reasonable restriction on "personal liberty" as understood in the context of Article 21 of the Constitution?

- b 12. Before answering these questions, it is necessary to examine the evolution and specific uses of the impugned techniques. Hence, a description of each of the test procedures is followed by an overview of their possible uses, both within and outside the criminal justice system. It is also necessary to gauge the limitations of these techniques. Owing to the dearth of Indian decisions on this subject, we must look to precedents from foreign jurisdictions which deal with the application of these techniques in the area of criminal justice.

Descriptions of tests — Uses, limitations and precedents

Polygraph examination

- c 13. The origins of polygraph examination have been traced back to the efforts of Lombroso, a Criminologist who experimented with a machine that measured blood pressure and pulse to assess the honesty of persons suspected of criminal conduct. His device was called a hydrosphygmograph. A similar device was used by Psychologist William Marston during World War I in espionage cases, which proved to be a precursor to its use in the criminal justice system. In 1921, John Larson incorporated the measurement of respiration rate and by 1939 Leonard Keeler added skin conductance and an amplifier to the parameters examined by a polygraph machine.

- d 14. The theory behind polygraph tests is that when a subject is lying in response to a question, he/she will produce physiological responses that are different from those that arise in the normal course. During the polygraph examination, several instruments are attached to the subject for measuring and recording the physiological responses. The examiner then reads these results, analyses them and proceeds to gauge the credibility of the subject's answers. Instruments such as cardiographs, pneumographs, cardio-cuffs and sensitive electrodes are used in the course of the polygraph examinations. They measure changes in aspects such as respiration, blood pressure, blood flow, pulse and galvanic skin resistance. The truthfulness or falsity on part of the subject is assessed by relying on the records of the physiological responses. [See *Laboratory Procedure Manual—Polygraph Examination* (Directorate of Forensic Science, Ministry of Home Affairs, Government of India, New Delhi, 2005).]

- e 15. There are three prominent polygraph examination techniques:

- f (i) The relevant-irrelevant (R-I) technique.
g (ii) The control-question (CQ) technique.
h (iii) Directed lie control (DLC) technique.

- Each of these techniques includes a pre-test interview during which the subject is acquainted with the test procedure and the examiner gathers the information which is needed to finalise the questions that are to be asked. An important objective of this exercise is to mitigate the possibility of a feeling

of surprise on the part of the subject which could be triggered by unexpected questions. This is significant because an expression of surprise could be mistaken for physiological responses that are similar to those associated with deception. [Refer David Gallai, "Polygraph Evidence in Federal Courts: Should it be Admissible?"¹.] Needless to say, the polygraph examiner should be familiar with the details of the ongoing investigation. To meet this end the investigators are required to share copies of documents such as the first information report (FIR), medico-legal reports (MLR) and post-mortem reports (PMR) depending on the nature of the facts being investigated.

16. The control-question (CQ) technique is the most commonly used one and its procedure as well as scoring system has been described in the materials submitted on behalf of CBI. The test consists of control questions and relevant questions. The control questions are irrelevant to the facts being investigated but they are intended to provoke distinct physiological responses as well as false denials. These responses are compared with the responses triggered by the relevant questions. Theoretically, a truthful subject will show greater physiological responses to the control questions which he/she has reluctantly answered falsely, than to the relevant questions, which the subject can easily answer truthfully. Conversely, a deceptive subject will show greater physiological responses while giving false answers to the relevant questions in comparison to the responses triggered by false answers to the control questions. In other words, a guilty subject is more likely to be concerned with lying about the relevant facts as opposed to lying about other facts in general. An innocent subject will have no trouble in truthfully answering the relevant questions but will have trouble in giving false answers to the control questions. The scoring of the tests is done by assigning a numerical value, positive or negative, to each response given by the subject. After accounting for all the numbers, the result is compared to a standard numerical value to indicate the overall level of deception. The net conclusion may indicate truth, deception or uncertainty.

17. The use of polygraph examinations in the criminal justice system has been contentious. In this case, we are mainly concerned with situations when investigators seek reliance on these tests to detect deception or to verify the truth of previous testimonies. Furthermore, litigation related to polygraph tests has also involved situations where the suspects and defendants in criminal cases have sought reliance on them to demonstrate their innocence. It is also conceivable that witnesses can be compelled to undergo polygraph tests in order to test the credibility of their testimonies or to question their mental capacity or to even attack their character.

18. Another controversial use of polygraph tests has been on victims of sexual offences for testing the veracity of their allegations. While several States in USA have enacted provisions to prohibit such use, the text of the *Laboratory Procedure Manual for Polygraph Examination* indicates that this

¹ 36 American Criminal Law Review 87-116 (Winter 1999) at p. 91

is an acceptable use. In this regard, Para 3.4(v) of the said Manual reads as follows:

a “3.4. (v) In cases of alleged sex offences such as intercourse with a female child, forcible rape, indecent liberties or perversion, it is important that the victim, as well as the accused, be made available for interview and polygraph examination. It is essential that the polygraph examiner get a first-hand detailed statement from the victim, and the interview of the victim precede that of the suspect or witnesses. ...”

b The following article includes a table which lists out the statutorily permissible uses of polygraph examination in different State jurisdictions of the United States of America: [Henry T. Greely and Judy Illes, “Neuroscience-based Lie Detection: The Urgent Need for Regulation”².]

c 19. The propriety of compelling the victims of sexual offences to undergo a polygraph examination certainly merits consideration in the present case. It must also be noted that in some jurisdictions polygraph tests have been permitted for the purpose of screening public employees, both at the stage of recruitment and at regular intervals during the service period. In USA, the widespread acceptance of polygraph tests for checking the antecedents and monitoring the conduct of public employees has encouraged private employers to resort to the same. In fact the Employee Polygraph Protection Act, 1988 was designed to restrict their use for employee screening. This development must be noted because the unqualified acceptance of “lie detector tests” in India’s criminal justice system could have the unintended consequence of encouraging their use by private parties.

e 20. Polygraph tests have several limitations and therefore a margin for errors. The premise behind these tests is questionable because the measured changes in physiological responses are not necessarily triggered by lying or deception. Instead, they could be triggered by nervousness, anxiety, fear, confusion or other emotions. Furthermore, the physical conditions in the polygraph examination room can also create distortions in the recorded responses. The test is best administered in comfortable surroundings where there are no potential distractions for the subject and complete privacy is maintained. The mental state of the subject is also vital since a person in a state of depression or hyperactivity is likely to offer highly disparate physiological responses which could mislead the examiner. In some cases the subject may have suffered from loss of memory in the intervening time period between the relevant act and the conduct of the test. When the subject does not remember the facts in question, there will be no self-awareness of truth or deception and hence the recording of the physiological responses will not be helpful. Errors may also result from “memory-hardening” i.e. a process by which the subject has created and consolidated false memories about a particular incident. This commonly occurs in respect of recollections of traumatic events and the subject may not be aware of the fact that he/she is lying.

21. The errors associated with polygraph tests are broadly grouped into two categories i.e. "false positives" and "false negatives". A "false positive" occurs when the results indicate that a person has been deceitful even though he/she answered truthfully. Conversely a "false negative" occurs when a set of deceptive responses is reported as truthful. On account of such inherent complexities, the qualifications and competence of the polygraph examiner are of the utmost importance. The examiner needs to be thorough in preparing the questionnaire and must also have the expertise to account for extraneous conditions that could lead to erroneous inferences. However, the biggest concern about polygraph tests is that an examiner may not be able to recognise deliberate attempts on part of the subject to manipulate the test results. Such "countermeasures" are techniques which are deliberately used by the subject to create certain physiological responses in order to deceive the examiner. The intention is that by deliberately enhancing one's reaction to the control questions, the examiner will incorrectly score the test in favour of truthfulness rather than deception. The most commonly used "countermeasures" are those of creating a false sense of mental anxiety and stress at the time of the interview, so that the responses triggered by lying cannot be readily distinguished.

22. Since polygraph tests have come to be widely relied upon for employee screening in USA, the US Department of Energy had requested the National Research Council of the National Academies (NRC) to review their use for different purposes. The following conclusion was stated in its report, i.e. *The Polygraph and Lie Detection: Committee to Review the Scientific Evidence on the Polygraph* (Washington DC: National Academies Press, 2003) at pp. 212-13:

"Polygraph accuracy.—Almost a century of research in scientific psychology and physiology provides little basis for the expectation that a polygraph test could have extremely high accuracy. The physiological responses measured by the polygraph are not uniquely related to deception. That is, the responses measured by the polygraph do not all reflect a single underlying process: a variety of psychological and physiological processes, including some that can be consciously controlled, can affect polygraph measures and test results. Moreover, most polygraph testing procedures allow for uncontrolled variation in test administration (e.g. creation of the emotional climate, selecting questions) that can be expected to result in variations in accuracy and that limit the level of accuracy that can be consistently achieved.

Theoretical basis.—The theoretical rationale for the polygraph is quite weak, especially in terms of differential fear, arousal, or other emotional states that are triggered in response to relevant or comparison questions. We have not found any serious effort at construct validation of polygraph testing.

Research progress.—Research on the polygraph has not progressed over time in the manner of a typical scientific field. It has not

a accumulated knowledge or strengthened its scientific underpinnings in any significant manner. Polygraph research has proceeded in relative isolation from related fields of basic science and has benefited little from conceptual, theoretical, and technological advances in those fields that are relevant to the psychophysiological detection of deception.

b *Future potential.—The inherent ambiguity of the physiological measures used in the polygraph suggest that further investments in improving polygraph technique and interpretation will bring only modest improvements in accuracy.* (italicised in original)

c 23. A Working Party of the British Psychological Society (BPS) also came to a similar conclusion in a study published in 2004. The key finding is reproduced below [cited from: *A Review of the Current Scientific Status and Fields of Application of Polygraph Deception Detection—Final Report (6-10-2004)* from The British Psychological Society (BPS) Working Party at p. 10]:

d “A polygraph is sometimes called a lie detector, but this term is misleading. A polygraph does not detect lies, but only arousal which is assumed to accompany telling a lie. Polygraph examiners have no other option than to measure deception in such an indirect way, as a pattern of physiological activity directly related to lying does not exist (Saxe, 1991). Three of the four most popular lie detection procedures using the polygraph (relevant/irrelevant test, control-question test and directed lie test) are built upon the premise that, while answering so-called ‘relevant’ questions, liars will be more aroused than while answering so-called ‘control’ questions, due to a fear of detection (fear of getting caught lying). This premise is somewhat naive as truth tellers may also be more aroused when answering the relevant questions, particularly: (i) when these relevant questions are emotion evoking questions (e.g. when an innocent man, suspected of murdering his beloved wife, is asked questions about his wife in a polygraph test, the memory of his late wife might reawaken his strong feelings about her); and (ii) when the innocent examinee experiences fear, which may occur, for example, when the person is afraid that his or her honest answers will not be believed by the polygraph examiner. The other popular test (guilty knowledge test) is built upon the premise that guilty examinees will be more aroused concerning certain information due to different orienting reactions, that is, they will show enhanced orienting responses when recognising crucial details of a crime. This premise has strong support in psychophysiological research (Fiedler, Schmidt & Stahl, 2002).”

g 24. Coming to judicial precedents, a decision reported as *Frye v. United States*³ dealt with a precursor to the polygraph which detected deception by measuring changes in systolic blood pressure. In that case the defendant was subjected to this test before the trial and his counsel had requested the court that the scientist who had conducted the same should be allowed to give expert testimony about the results. Both the trial court and the appellate court

rejected the request for admitting such testimony. The appellate court identified the considerations that would govern the admissibility of expert testimony based on scientific insights. It was held, *ibid.* at p. 47:

“... Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognised scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.

We think the systolic blood pressure deception test has not yet gained such standing and scientific recognition among physiological and psychological authorities as would justify the courts in admitting expert testimony deduced from the discovery, development, and experiments thus far made.”

25. The standard of “general acceptance in the particular field” governed the admissibility of scientific evidence for several decades. It was changed much later by the US Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals Inc.*⁴ In that case the petitioners had instituted proceedings against a pharmaceutical company which had marketed “Bendectin”, a prescription drug. They had alleged that the ingestion of this drug by expecting mothers had caused birth defects in the children born to them. To contest these allegations, the pharmaceutical company had submitted an affidavit authored by an epidemiologist. The petitioners had also submitted expert opinion testimony in support of their contentions. The District Court had ruled in favour of the company by ruling that their scientific evidence met the standard of “general acceptance in the particular field” whereas the expert opinion testimony produced on behalf of the petitioners did not meet the said standard. The Court of Appeals for the Ninth Circuit upheld the judgment and the case reached the US Supreme Court which vacated the appellate court’s judgment and remanded the case back to the trial court. It was unanimously held that the “general acceptance” standard articulated in *Frye*³ had since been displaced by the enactment of the Federal Rules of Evidence in 1975, wherein Rule 702 governed the admissibility of expert opinion testimony that was based on scientific findings. This Rule provided that:

“702. *Testimony by experts.*—If scientific, technical, or other specialised knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise....”

⁴ 125 L. Ed 2d 469 : 509 US 579 (1993)

³ *Frye v. United States*, 54 App DC 46 (1923)

26. It was held in *Daubert case*⁴ that the trial court should have evaluated the scientific evidence as per Rule 702 of the Federal Rules of Evidence which mandates an inquiry into the relevance as well as the reliability of the scientific technique in question. The majority opinion (Blackmun, J.) noted that the trial Judge's first step should be a preliminary assessment of whether the testimony's underlying reasoning or methodology is scientifically valid and whether it can be properly applied to the facts in issue. Several other considerations will be applicable, such as:

- a
- b
 - whether the theory or technique in question can be and has been tested;
 - whether it has been subjected to peer review and publication;
 - its known or potential error rate;
 - the existence and maintenance of standards controlling its operation; and
- c
 - whether it has attracted widespread acceptance within the scientific community.

27. It was further observed in *Daubert case*⁴ that such an inquiry should be a flexible one, and its focus must be solely on principles and methodology, not on the conclusions that they generate. It was reasoned that instead of the wholesale exclusion of scientific evidence on account of the high threshold of proving "general acceptance in the particular field", the same could be admitted and then challenged through conventional methods such as cross-examination, presentation of contrary evidence and careful instructions to the juries about the burden of proof. In this regard, the trial Judge is expected to perform a "gatekeeping" role to decide on the admission of expert testimony based on scientific techniques. It should also be kept in mind that Rule 403 of the Federal Rules of Evidence, 1975 empowers a trial Judge to exclude any form of evidence if it is found that its probative value will be outweighed by its prejudicial effect.

28. Prior to *Daubert*⁴ decision, most jurisdictions in USA had disapproved of the use of polygraph tests in criminal cases. Some State jurisdictions had absolutely prohibited the admission of polygraph test results, while a few had allowed consideration of the same if certain conditions were met. These conditions included a prior stipulation between the parties to undergo these tests with procedural safeguards such as the involvement of the experienced examiners, presence of the counsel and proper recording to enable subsequent scrutiny. A dissonance had also emerged in the treatment of polygraph test results in the different Circuit jurisdictions, with some jurisdictions giving trial Judges the discretion to enquire into the reliability of polygraph test results on a case-by-case basis.

29. For example, in *United States v. Piccinonna*⁵ it was noted that in some instances polygraphy satisfied the standard of "general acceptance in the particular field" as required by *Frye*³. It was held that polygraph

h ⁴ *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 125 L Ed 2d 469 : 509 US 579 (1993)
⁵ 885 F 2d 1529 (11th Cir 1989)
³ *Frye v. United States*, 54 App DC 46 (1923)

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testimony could be admissible under two situations, namely, when the parties themselves agree on a stipulation to this effect or for the purpose of impeaching and corroborating the testimony of witnesses. It was clarified that polygraph examination results could not be directly used to bolster the testimony of a witness. However, they could be used to attack the credibility of a witness or even to rehabilitate one after his/her credibility has been attacked by the other side. Despite these observations, the trial court did not admit the polygraph results on remand in this particular case. a

30. However, after *Daubert*⁴ prescribed a more liberal criterion for determining the admissibility of scientific evidence, some courts ruled that weightage could be given to polygraph results. For instance in *United States v. Posado*⁶, the facts related to a pre-trial evidentiary hearing where the defendants had asked for the exclusion of forty-four kilograms of cocaine that had been recovered from their luggage at an airport. The District Court had refused to consider polygraph evidence given by the defendants in support of their version of events leading up to the seizure of the drugs and their arrest. On appeal, the Fifth Circuit Court held that the rationale for disregarding polygraph evidence did not survive *Daubert*⁴ decision. The Court proceeded to remand the case to the trial court and directed that the admissibility of the polygraph results should be assessed as per the factors enumerated in *Daubert*⁴. It was held *ibid.* at p. 434: b c d

"There can be no doubt that tremendous advances have been made in polygraph instrumentation and technique in the years since *Frye*³. The test at issue in *Frye*³ measured only changes in the subject's systolic blood pressure in response to test questions. [*Frye v. United States*³] Modern instrumentation detects changes in the subject's blood pressure, pulse, thoracic and abdominal respiration, and galvanic skin response. Current research indicates that, when given under controlled conditions, the polygraph technique accurately predicts truth or deception between seventy and ninety per cent of the time. Remaining controversy about test accuracy is almost unanimously attributed to variations in the integrity of the testing environment and the qualifications of the examiner. Such variation also exists in many of the disciplines and for much of the scientific evidence we routinely find admissible under Rule 702. [See *McCormick on Evidence*, 206 at 915 & n. 57.] Further, there is good indication that polygraph technique and the requirements for professional polygraphists are becoming progressively more standardized. In addition, polygraph technique has been and continues to be subjected to extensive study and publication. Finally, polygraph is now so widely used by employers and government agencies alike. e f g

To iterate, we do not now hold that polygraph examinations are scientifically valid or that they will always assist the trier of fact, in this or any other individual case. We merely remove the obstacle of the per se h

4 *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 125 L. Ed 2d 469 : 509 US 579 (1993)

6 57 F 3d 428 (5th Cir 1995)

3 *Frye v. United States*, 54 App DC 46 (1923)

a rule against admissibility, which was based on antiquated concepts about the technical ability of the polygraph and legal precepts that have been expressly overruled by the Supreme Court.” (internal citations omitted)

Despite these favourable observations, the polygraph results were excluded by the District Court on remand.

b 31. However, we have come across at least one case decided after *Daubert*⁴ where a trial court had admitted expert opinion testimony about polygraph results. In *United States v. Galbreth*⁷ the District Court took note of Article 707 of the Rules of Evidence of New Mexico, USA which established standards for the admission of polygraph evidence. The said provision laid down that polygraph evidence would be admissible only when the following conditions are met: the examiner must have had at least 5 years’ experience in conducting polygraph tests and 20 hours of continuing education within the past year; the polygraph examination must be tape recorded in its entirety; the polygraph charts must be scored quantitatively in a manner generally accepted as reliable by polygraph experts; all polygraph materials must be provided to the opposing party at least 10 days before trial; and all polygraph examinations conducted on the subject must be disclosed. It was found that all of these requirements had been complied with in the facts at hand. The District Court concluded with these words, *ibid.* at p. 896:

d “... the Court finds that the expert opinion testimony regarding the polygraph results of defendant Galbreth is admissible. However, because the evidentiary reliability of opinion testimony regarding the results of a particular polygraph test is dependent upon a properly conducted examination by a highly qualified, experienced and skilful examiner, nothing in this opinion is intended to reflect the judgment that polygraph results are per se admissible. Rather, in the context of the polygraph technique, the trial courts must engage upon a case specific inquiry to determine the admissibility of such testimony.”

e 32. We were also alerted to the decision in *United States v. Cordoba*⁸. In that case, the Ninth Circuit Court concluded that the position favouring absolute exclusion of unstipulated polygraph evidence had effectively been overruled in *Daubert*⁴. The defendant had been convicted for the possession and distribution of cocaine since the drugs had been recovered from a van which he had been driving. However, when he took an unstipulated polygraph test, the results suggested that he was not aware of the presence of drugs in the van. At the trial stage, the prosecution had moved to suppress the test results and the District Court had accordingly excluded the polygraph evidence. However, the Ninth Circuit Court remanded the case back after finding that the trial Judge should have adopted the parameters enumerated in *Daubert*⁴ to decide on the admissibility of the polygraph test results. It was observed, *ibid.* at p. 228:

h ⁴ *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 125 L Ed 2d 469 : 509 US 579 (1993)

⁷ 908 F Supp 877 (DNM 1995)

⁸ 104 F 3d 225 (9th Cir 1997)

"With this holding, we are not expressing new enthusiasm for admission of unstipulated polygraph evidence. The inherent problematic nature of such evidence remains. As we noted in *Brown*⁹, polygraph evidence has grave potential for interfering with the deliberative process. [F 2d at pp. 1396-97.] However, these matters are for determination by the trial Judge who must not only evaluate the evidence under Rule 702, but consider admission under Rule 403. Thus, we adopt the view of Judge Jameson's dissent in *Brown*⁹ that these are matters which must be left to the sound discretion of the trial court, consistent with *Daubert*⁴ standards."

33. The decisions cited above had led to some uncertainty about the admissibility of polygraph test results. However, this uncertainty was laid to rest by an authoritative ruling of the US Supreme Court in *United States v. Scheffer*¹⁰. In that case, an eight-Judge majority decided that the Military Rule of Evidence, §707 (which made polygraph results inadmissible in court-martial proceedings) did not violate an accused person's Sixth Amendment right to present a defence. The relevant part of the provision is as follows:

"(a) Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence."

34. The facts in *Scheffer case*¹⁰ were that Scheffer, a US Air Force serviceman had faced the court-martial proceedings because a routine urinalysis showed that he had consumed methamphetamines. However, a polygraph test suggested that he had been truthful in denying the intentional consumption of the drugs. His defence of "innocent ingestion" was not accepted during the court-martial proceedings and the polygraph results were not admitted in evidence. The Air Force Court of Criminal Appeals affirmed the decision given in the court-martial proceedings but the Court of Appeals for the Armed Forces reversed the same by holding that an absolute exclusion of polygraph evidence (offered to rebut an attack on the credibility of the accused) would violate Scheffer's Sixth Amendment right to present a defence. Hence, the matter reached the Supreme Court which decided that the exclusion of polygraph evidence did not violate the said constitutional right. Eight Judges agreed that testimony about polygraph test results should not be admissible on account of the inherent unreliability of the results obtained. Four Judges agreed that reliance on polygraph results would displace the fact-finding role of the jury and lead to a collateral litigation. In the words of Clarence Thomas, J., *ibid.* at p. 309:

"Rule 707 serves several legitimate interests in the criminal trial process. These interests include ensuring that only reliable evidence is introduced at trial, preserving the jury's role in determining credibility,

⁹ *Brown v. Darcy*, 783 F 2d 1389 (9th Cir 1986)

⁴ *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 125 L Ed 2d 469 : 509 US 579 (1993)

¹⁰ 140 L Ed 2d 413 : 523 US 303 (1998)

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a and avoiding litigation that is collateral to the primary purpose of the trial. The rule is neither arbitrary nor disproportionate in promoting these ends. Nor does it implicate a sufficiently weighty interest of the defendant to raise a constitutional concern under our precedents.”

35. On the issue of reliability, the Court took note of some Circuit Court decisions which had permitted trial courts to consider polygraph results in accordance with the *Daubert*⁴ factors. However, the following stance was adopted, *ibid.* at p. 312:

b “... Although the degree of reliability of polygraph evidence may depend upon a variety of identifiable factors, there is simply no way to know in a particular case whether a polygraph examiner’s conclusion is accurate, because certain doubts and uncertainties plague even the best polygraph exams. Individual jurisdictions therefore may reasonably reach differing conclusions as to whether polygraph evidence should be
c admitted. We cannot say, then, that presented with such widespread uncertainty, the President acted arbitrarily or disproportionately in promulgating a per se rule excluding all polygraph evidence.”

d 36. Since a trial by jury is an essential feature of the criminal justice system in USA, concerns were expressed about preserving the jury’s core function of determining the credibility of testimony. It was observed, *ibid.* at p. 314:

e “... Unlike other expert witnesses who testify about factual matters outside the jurors’ knowledge, such as the analysis of fingerprints, ballistics, or DNA found at a crime scene, a polygraph expert can supply the jury only with another opinion, in addition to its own, about whether the witness was telling the truth. Jurisdictions, in promulgating rules of
f evidence, may legitimately be concerned about the risk that juries will give excessive weight to the opinions of a polygrapher, clothed as they are in scientific expertise and at times offering, as in the respondent’s case, a conclusion about the ultimate issue in the trial. Such jurisdictions may legitimately determine that the aura of infallibility attending polygraph evidence can lead jurors to abandon their duty to assess credibility and guilt. ...”

37. On the issue of encouraging litigation that is collateral to the primary purpose of a trial, it was held, *ibid.* at p. 314:

g “... Allowing proffers of polygraph evidence would inevitably entail assessments of such issues as whether the test and control questions were appropriate, whether a particular polygraph examiner was qualified and had properly interpreted the physiological responses, and whether other
h factors such as countermeasures employed by the examinee had distorted the exam results. Such assessments would be required in each and every case. It thus offends no constitutional principle for the President to conclude that a per se rule excluding all polygraph evidence is appropriate. Because litigation over the admissibility of polygraph

4 *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 125 L Ed 2d 469 : 509 US 579 (1993)

evidence is by its very nature collateral, a per se rule prohibiting its admission is not an arbitrary or disproportionate means of avoiding it."

In the same case, Kennedy, J., filed an opinion which was joined by four Judges. While there was agreement on the questionable reliability of polygraph results, a different stand was taken on the issues pertaining to the role of the jury and the concerns about collateral litigation. It was observed that the inherent reliability of the test results is a sufficient ground to exclude the polygraph test results and expert testimony related to them. Stevens, J., filed a dissenting opinion in this case.

38. We have also come across a decision of the Canadian Supreme Court in *R. v. Beland*¹¹. In that case the respondents had been charged with conspiracy to commit robbery. During their trial, one of their accomplices had given testimony which directly implicated them. The respondents contested this testimony and after the completion of the evidentiary phase of the trial, they moved an application to reopen their defence while seeking permission for each of them to undergo a polygraph examination and produce the results in evidence. The trial Judge denied this motion and the respondents were convicted. However, the appellate court allowed their appeal from conviction and granted an order to reopen the trial and directed that the polygraph results be considered. On further appeal, the Supreme Court of Canada held that the results of a polygraph examination are not admissible as evidence. The majority opinion explained that the admission of polygraph test results would offend some well-established rules of evidence. It examined the "rule against oath-helping" which prohibits a party from presenting evidence solely for the purpose of bolstering the credibility of a witness. Consideration was also given to the "rule against admission of past or out-of-court statements by a witness" as well as the restrictions on producing "character evidence". The discussion also concluded that polygraph evidence is inadmissible as "expert evidence".

39. With regard to the "rule against admission of past or out-of-court statements by a witness", McIntyre, J. observed (in para 11):

"... In my view, the rule against admission of consistent out-of-court statements is soundly based and particularly apposite to questions raised in connection with the use of the polygraph. Polygraph evidence when tendered would be entirely self-serving and would shed no light on the real issues before the court. Assuming, as in the case at Bar, that the evidence sought to be adduced would not fall within any of the well-recognized exceptions to the operation of the rule—where it is permitted to rebut the allegation of a recent fabrication or to show physical, mental or emotional condition—it should be rejected. To do otherwise is to open the trial process to the time-consuming and confusing consideration of collateral issues and to deflect the focus of the proceedings from their fundamental issue of guilt or innocence. This view is summarized by D.W. Elliott in 'Lie Detector Evidence: Lessons

¹¹ (1987) 36 CCC 3d 481 : (1987) 2 SCR 398 (Can SC)

from the American Experience' in *Well and Truly Tried** (1982), at pp. 129-30:

- a A defendant who attempts to put in the results of a test showing this truthfulness on the matters in issue is bound to fall foul of the rule against self-serving statements or, as it is sometimes called, the rule that a party cannot manufacture evidence for himself, and the falling foul will not be in any mere technical sense. The rule is sometimes applied in a mechanical unintelligent way to exclude evidence about which no realistic objection could be raised, as the leading case, *Gillie v. Posho Ltd.*¹² shows; but striking down defence polygraph evidence on this ground would be no mere technical reflex action of legal obscurantists. The policy behind the doctrine is a fundamental one, and defence polygraph evidence usually offends it fundamentally. As some Judges have pointed out, only those defendants who successfully take examinations are likely to want the results admitted. There is no compulsion to put in the first test results obtained. A defendant can take the test many times, if necessary 'examiner-shopping', until he gets a result which suits him. Even stipulated tests are not free of this taint, because of course his lawyers will advise him to have several secret trial runs before the prosecution is approached. If nothing else, the dry runs will habituate him to the process and to the expected relevant questions."
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- d

40. On the possibility of using polygraph test results as character evidence, it was observed (para 14):

- e "... What is the consequence of this rule in relation to polygraph evidence? Where such evidence is sought to be introduced it is the operator who would be called as the witness and it is clear, of course, that the purpose of his evidence would be to bolster the credibility of the accused and, in effect, to show him to be of good character by inviting the inference that he did not lie during the test. In other words, it is evidence not of general reputation but of a specific incident and its admission would be precluded under the rule. It would follow, then, that the introduction of evidence of the polygraph tests would violate the character evidence rule."
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41. McIntyre, J. offered the following conclusions (at paras 18, 19 and 20):

- g "18. In conclusion, it is my opinion, based upon a consideration of rules of evidence long established and applied in our courts, that the polygraph has no place in the judicial process where it is employed as a tool to determine or to test the credibility of witnesses. It is frequently argued that the polygraph represents an application of modern scientific knowledge and experience to the task of determining the veracity of human utterances. It is said that the courts should welcome this device and not cling to the imperfect methods of the past in such an important
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* Edited by Enid Campbell and Louis Waller
12 (1939) 2 All ER 196 (PC)

task. This argument has a superficial appeal, but, in my view, it cannot prevail in the face of realities of court procedures.

19. I would say at once that this view is not based on a fear of the inaccuracies of the polygraph. On that question we were not supplied with sufficient evidence to reach a conclusion. However, it may be said that even the finding of a significant percentage of errors in its results would not, by itself, be sufficient ground to exclude it as an instrument for use in the courts. Error is inherent in human affairs, scientific or unscientific. It exists within our established court procedures and must always be guarded against. The compelling reason, in my view, for the exclusion of the evidence of polygraph results in judicial proceedings is twofold. First, the admission of polygraph evidence would run counter to the well-established rules of evidence which have been referred to. Second, while there is no reason why the rules of evidence should not be modified where improvement will result, it is my view that the admission of polygraph evidence will serve no purpose which is not already served. It will disrupt proceedings, cause delays, and lead to numerous complications which will result in no greater degree of certainty in the process than that which already exists.

20. Since litigation replaced trial by combat, the determination of fact, including the veracity of parties and their witnesses, has been the duty of Judges or juries upon an evaluation of the statements of witnesses. This approach has led to the development of a body of rules relating to the giving and reception of evidence and we have developed methods which have served well and have gained a wide measure of approval. They have facilitated the orderly conduct of judicial proceedings and are designed to keep the focus of the proceedings on the principal issue, in a criminal case, the guilt or innocence of the accused. What would be served by the introduction of evidence of polygraph readings into the judicial process? To begin with, it must be remembered that however scientific it may be, its use in court depends on the human intervention of the operator. Whatever results are recorded by the polygraph instrument, their nature and significance reach the trier of fact through the mouth of the operator. Human fallibility is therefore present as before, but now it may be said to be fortified with the mystique of science. ..."

Narcoanalysis technique

42. This test involves the intravenous administration of a drug that causes the subject to enter into a hypnotic trance and become less inhibited. The drug-induced hypnotic stage is useful for investigators since it makes the subject more likely to divulge information. The drug used for this test is sodium pentothal, higher quantities of which are routinely used for inducing general anaesthesia in surgical procedures. This drug is also used in the field of psychiatry since the revelations can enable the diagnosis of mental disorders. However, we have to decide on the permissibility of resorting to

a this technique during a criminal investigation, despite its established uses in the medical field. The use of "truth-serums" and hypnosis is not a recent development. Earlier versions of the narcoanalysis technique utilised substances such as scopolamine and sodium amytal.

43. The following extracts from an article trace the evolution of this technique [cited from C.W. Muehlberger, "Interrogation under Drug Influence: The So-called 'Truth Serum' Technique",¹³ *The Journal of Criminal Law, Criminology and Police Science* at pp. 513-14]:

b "With the advent of anaesthesia about a century ago, it was observed that during the induction period and particularly during the recovery interval, patients were prone to make extremely naive remarks about personal matters, which, in their normal state, would never have revealed.

c Probably the earliest direct attempt to utilize this phenomenon in criminal interrogation stemmed from observations of a mild type of anaesthesia commonly used in obstetrical practice during the period of about 1903-1915 and known as 'twilight sleep'. This anaesthesia was obtained by hypodermic injection of solutions of morphine and scopolamine (also called 'hyoscine') followed by intermittent chloroform inhalations if needed. The pain relieving qualities of morphine are well known. Scopolamine appears to have the added property of blocking out memories of recent events. By the combination of these drugs in suitable dosage, morphine dulled labor pains without materially interfering with the muscular contractions of labor, while scopolamine wiped out subsequent memories of the delivery room ordeal. The technique was widely used in Europe but soon fell into disrepute among obstetricians of this country, largely due to overdosage.

e During the period of extensive use of 'twilight sleep' it was a common experience that women who were under drug influence, were extremely candid and uninhibited in their statements. They often made remarks which obviously would never have been uttered when in their normal state. Dr. Robert E. House, an observant physician practising in Ferris, Texas, believed that a drug combination which was so effective in the removal of ordinary restraints and which produced such utter candor, might be of value in obtaining factual information from persons who were thought to be lying. Dr. House's first paper presented in 1922 suggested drug administration quite similar to the standard 'twilight sleep' procedure: an initial dose of 1/4 grain of morphine sulphate together with 1/100 grain of scopolamine hydrobromide, followed at 20-30 minute intervals with smaller (1/200-1/400 grain) doses of scopolamine and periods of light chloroform anaesthesia. Subjects were questioned as they recovered from the light chloroform anaesthesia and gave answers which subsequently proved to be true. Altogether, Dr. House reported about half-a-dozen cases, several of which were

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13 42(4) *The Journal of Criminal Law, Criminology and Police Science* 513-528 (November-December 1951)

instrumental in securing the release of convicts from State prisons, he also observed that, after returning to their normal state, these subjects had little or no recollection of what had transpired during the period of interrogation. They could not remember what questions had been asked, nor by whom; neither could they recall any answers which they had made.” a

44. The use of the “scopolamine” technique led to the coining of the expression “truth serum”. With the passage of time, injections of sodium amytal came to be used for inducing subjects to talk freely, primarily in the field of psychiatry. The author cited above has further observed, *ibid.* at p. 522: b

“During World War II, this general technique of delving into a subject’s inner consciousness through the instrumentality of narcotic drugs was widely used in the treatment of war neuroses (sometimes called ‘battle shock’ or ‘shell shock’). Fighting men who had been through terrifically disturbing experiences often times developed symptoms of amnesia, mental withdrawal, negativity, paralyses, or many other mental, nervous, and physical derangements. In most instances, these patients refused to talk about the experiences which gave rise to the difficulty, and psychiatrists were at a loss to discover the crux of the problem. To intelligently counteract such a force, it was first necessary to identify it. Thus, the use of sedative drugs, first to analyze the source of disturbance (narcoanalysis) and later to obtain the proper frame of mind in which the patient could and would ‘talk out’ his difficulties, and, as they say ‘get them off his chest’—and thus relieve himself (narcosynthesis or narco-therapy)—was employed with signal success. d

In the narcoanalysis of war neuroses a very light narcosis is most desirable. With small doses of injectable barbiturates (sodium amytal or sodium pentothal) or with light inhalations of nitrous oxide or somnoform, the subject pours out his pent-up emotions without much prodding by the interrogator.” e

45. It has been shown that the Central Investigation Agency (CIA) in USA had conducted research on the use of sodium pentothal for aiding interrogations in intelligence and counter-terrorism operations as early as the 1950’s [see “Project MKULTRA—The CIA’s Program of Research in Behavioral Modification”, on file with *Schaffer Library of Drug Policy*¹⁴]. f

46. In recent years, the debate over the use of “truth serums” has been revived with demands for their use on persons suspected of involvement in terrorist activities. Coming to the test procedure, when the drug (sodium pentothal) is administered intravenously, the subject ordinarily descends into anaesthesia in four stages, namely: g

- (i) Awake stage
- (ii) Hypnotic stage
- (iii) Sedative stage h

(iv) Anaesthetic stage

a 47. A relatively lighter dose of sodium pentothal is injected to induce the “hypnotic stage” and the questioning is conducted during the same. The hypnotic stage is maintained for the required period by controlling the rate of administration of the drug. As per the materials submitted before us, the behaviour exhibited by the subject during this stage has certain specific characteristics, namely:

- b • It facilitates handling of negative emotional responses (i.e. guilt, avoidance, aggression, frustration, non-responsiveness, etc.) in a positive manner.
- It helps in rapid exploration and identification of underlying conflicts in the subject’s mind and unresolved feelings about past events.
- c • It induces the subject to divulge information which would usually not be revealed in conscious awareness and it is difficult for the person to lie at this stage.
- The reversal from this stage occurs immediately when the administration of the drug is discontinued.

d [Refer *Laboratory Procedure Manual—Forensic Narco-Analysis* (Directorate of Forensic Science, Ministry of Home Affairs, Government of India, New Delhi, 2005); also see John M. MacDonald, “Truth Serum”¹⁵.]

e 48. The personnel involved in conducting a “narcoanalysis” interview include a forensic psychologist, an anaesthesiologist, a psychiatrist, a general physician or other medical staff and a language interpreter if needed. Additionally a videographer is required to create video recordings of the test for subsequent scrutiny. In India, this technique has been administered either inside forensic science laboratories or in the operation theatres of recognised hospitals. While a psychiatrist and general physician perform the preliminary function of gauging whether the subject is mentally and physically fit to undergo the test, the anaesthesiologist supervises the intravenous administration of the drug. It is the forensic psychologist who actually f conducts the questioning. Since the tests are meant to aid investigation efforts, the forensic psychologist needs to closely cooperate with the investigators in order to frame appropriate questions.

g 49. This technique can serve several ends. The revelations could help investigators to uncover vital evidence or to corroborate pre-existing testimonies and prosecution theories. Narcoanalysis tests have also been used to detect “malingering” (faking of amnesia). The premise is that during the “hypnotic stage” the subject is unable to wilfully suppress the memories associated with the relevant facts. Thus, it has been urged that drug-induced revelations can help to narrow down investigation efforts thereby saving public resources. There is of course a very real possibility that information

h ¹⁵ 46(2) The Journal of Criminal Law, Criminology and Police Science 259-263 (July-August 1955)

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extracted through such interviews can lead to the uncovering of independent evidence which may be relevant. Hence, we must consider the implications of such derivative use of the drug-induced revelations, even if such revelations are not admissible as evidence. We must also account for the uses of this technique by persons other than investigators and prosecutors. Narcoanalysis tests could be requested by the defendants who want to prove their innocence. Demands for this test could also be made for purposes such as gauging the credibility of testimony, to refresh the memory of witnesses or to ascertain the mental capacity of persons to stand trial. Such uses can have a direct impact on the efficiency of investigations as well as the fairness of criminal trials. [See generally George H. Dession, Lawrence Z. Freedman, Richard C. Donnelly and Frederick G. Redlich, "Drug-Induced Revelation and Criminal Investigation"¹⁶.]

50. It is also important to be aware of the limitations of the "narcoanalysis" technique. It does not have an absolute success rate and there is always the possibility that the subject will not reveal any relevant information. Some studies have shown that most of the drug-induced revelations are not related to the relevant facts and they are more likely to be in the nature of inconsequential information about the subjects' personal lives. It takes great skill on part of the interrogators to extract and identify information which could eventually prove to be useful. While some persons are able to retain their ability to deceive even in the hypnotic state, others can become extremely suggestible to questioning. This is especially worrying, since investigators who are under pressure to deliver results could frame questions in a manner that prompts incriminatory responses. Subjects could also concoct fanciful stories in the course of the "hypnotic stage". Since the responses of different individuals are bound to vary, there is no uniform criteria for evaluating the efficacy of the "narcoanalysis" technique.

51. In an article¹³ published in 1951, C.W. Muehlberger had described a French case which attracted controversy in 1948. Raymond Cens, who had been accused of being a Nazi collaborator, appeared to have suffered an apoplectic stroke which also caused memory loss. The French Court trying the case had authorised a Board of Psychiatrists to conduct an examination for ascertaining the defendant's amnesia. The narcoanalysis technique was used in the course of the examination and the defendant did not object to the same. However, the test results showed that the subject's memory was not impaired and that he had been faking amnesia. At the trial, testimony about these findings was admitted, thereby leading to a conviction. Subsequently, Raymond Cens filed a civil suit against the psychiatrists alleging assault and illegal search. However, it was decided that the Board had used routine psychiatric procedures and since the actual physical damage to the defendant was nominal, the psychiatrists were acquitted. At the time, this case created

¹⁶ 62 Yale Law Journal 315-347 (February 1953)

¹³ 42(4) The Journal of Criminal Law, Criminology and Police Science 513-528 (November-December 1951)

- a quite a stir and the Council of the Paris Bar Association had passed a resolution against the use of drugs during interrogation. [Refer C.W. Muehlberger (1951) at p. 527; *Raymond Cens case* has also been discussed in the following article: J.P. Gagnieur, "The Judicial Use of Psychonarcosis in France"¹⁷.]

- b 52. An article published in 1961 [Andre A. Moenssens, "Narcoanalysis in Law Enforcement"¹⁸] had surveyed some judicial precedents from USA which dealt with the forensic uses of the narcoanalysis technique. The first reference is to a decision from the State of Missouri reported as *State v. Hudson*¹⁹. In that case, the defence lawyer in a prosecution for rape attempted to rely on the expert testimony of a doctor. The doctor in turn declared that he had questioned the defendant after injecting a truth serum and the defendant had denied his guilt while in a drug-induced state. The trial court had refused to admit the doctor's testimony by finding it to be completely unreliable from a scientific viewpoint. The appellate court upheld the finding and made the following observation, *ibid.* at p. 602:

- d "Testimony of this character—barring the sufficient fact that it cannot be classified otherwise than a self-serving declaration—is, in the present state of human knowledge, unworthy of serious consideration. We are not told from what well this serum is drawn or in what alembic its alleged truth compelling powers are distilled. Its origin is as nebulous as its effect is uncertain. ..."

- e 53. In *State v. Lindemuth*²⁰, the testimony of a psychiatrist was not admitted when he wanted to show that the answers given by a defendant while under the influence of sodium pentothal supported the defendant's plea of innocence in a murder case. The trial court's refusal to admit such testimony was endorsed by the appellate court, and it was noted, *ibid.* at p. 243:

- f "Until the use of the drug as a means of procuring the truth from people under its influence is accorded general scientific recognition, we are unwilling to enlarge the already immense field where medical experts, apparently equally qualified, express such diametrically opposed views on the same facts and conditions, to the despair of the court reporter and the bewilderment of the fact-finder."

- g 54. However, Andre Moenssens (1961) also took note of a case which appeared to endorse an opposing view. In *People v. Jones*²¹, the trial court overruled the prosecution's objection to the introduction of a psychiatrist's testimony on behalf of the defendant. The psychiatrist had conducted several tests on the defendant which included a sodium pentothal induced interview.

17 40(3) Journal of Criminal Law and Criminology 370-380 (September-October 1949)

18 52(4) The Journal of Criminal Law, Criminology and Police Science 453-458 (November-December 1961)

19 314 Mo 599 (1926)

20 56 NM 237 (1952)

21 42 Cal 2d 219 (1954)

The court found that this was not sufficient to exclude the psychiatrist's testimony in its entirety. It was observed that even though the truth of statements revealed under narcoanalysis remains uncertain, the results of the same could be clearly distinguished from the psychiatrist's overall conclusions which were based on the results of all the tests considered together.

55. At the Federal level, the US Court of Appeals for the Ninth Circuit dealt with a similar issue in *Lindsey v. United States*²². In that case, the trial court had admitted a psychiatrist's opinion testimony which was based on a clinical examination that included psychological tests and a sodium pentothal induced interview. The subject of the interview was a fifteen-year-old girl who had been sexually assaulted and had subsequently testified in a prosecution for rape. On cross-examination, the credibility of the victim's testimony had been doubted and in an attempt to rebut the same, the prosecution had called on the psychiatrist. On the basis of the results of the clinical examination, the psychiatrist offered his professional opinion that the victim had been telling the truth when she had repeated the charges that were previously made to the police. This testimony was admitted as a prior consistent statement to rehabilitate the witness but not considered as substantive evidence. Furthermore, a tape recording of the psychiatrist's interview with the girl, while she was under narcosis, was also considered as evidence. The jury went on to record a finding of guilt. When the case was brought in appeal before the Ninth Circuit Court, the conviction was reversed on the ground that the defendant had been denied the "due process of law". It was held that before a prior consistent statement made under the influence of a sodium pentothal injection could be admitted as evidence, it should be scientifically established that the test is absolutely accurate and reliable in all cases. Although the value of the test in psychiatric examinations was recognised, it was pointed out that the reliability of sodium pentothal tests had not been sufficiently established to warrant admission of its results in evidence. It was stated that "Scientific tests reveal that people thus prompted to speak freely do not always tell the truth." [Cited from Andre A. Moenssens¹⁸ (1961) at pp. 455-56.]

56. In *Lawrence M. Dugan v. Commonwealth of Kentucky*²³ the defendant had been given a truth serum test by a psychiatrist employed by him. The trial court refused to admit the psychiatrist's testimony which supported the truthfulness of the defendant's statement. The defendant had pleaded innocence by saying that a shooting which had resulted in the death of another person had been an accident. The trial court's decision was affirmed on appeal and it was reasoned that no court of last resort has recognised the admissibility of the results of truth serum tests, the principal ground being that such tests have not attained sufficient recognition of dependability and reliability.

22 237 F 2d 893 (9th Cir 1956)

18 52(4) The Journal of Criminal Law, Criminology and Police Science 453-458 (November-December 1961)

23 333 SW 2d 755 (1960)

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57. The US Supreme Court has also disapproved of the forensic uses of truth inducing drugs in *Townsend v. Sain*²⁴. In that case a heroin addict was arrested on the suspicion of having committed robbery and murder. While in custody he began to show severe withdrawal symptoms, following which the police officials obtained the services of a physician. In order to treat these withdrawal symptoms, the physician injected a combined dosage of 1/8 grain of phenobarbital and 1/230 grain of hyoscine. Hyoscine is same as "scopolamine" which has been described earlier. This dosage appeared to have a calming effect on Townsend and after the physician's departure he promptly responded to questioning by the police and eventually made some confessional statements. The petitioner's statements were duly recorded by a court reporter. The next day he was taken to the office of the prosecutor where he signed the transcriptions of the statements made by him on the previous day. [The facts of this case have also been discussed in Charles E. Sheedy, "Narcointerrogation of a Criminal Suspect"²⁵, *The Journal of Criminal Law, Criminology and Police Science* at pp. 118-19.]

58. When the case came up for trial, the counsel for the petitioner in *Townsend case*²⁴ brought a motion to exclude the transcripts of the statements from the evidence. However, the trial Judge denied this motion and admitted the court reporter's transcription of the confessional statements into evidence. Subsequently, a jury found Townsend to be guilty thereby leading to his conviction. When the petitioner made a habeas corpus application before a Federal District Court, one of the main arguments advanced was that the fact of scopolamine's character as a truth serum had not been brought out at the time of the motion to suppress the statements or even at the trial before the State Court. The Federal District Court denied the habeas corpus petition without a plenary evidentiary hearing, and this decision was affirmed by the Court of Appeals. Hence, the matter came before the US Supreme Court.

59. In an opinion authored by Earl Warren, C.J. the Supreme Court held that the Federal District Court had erred in denying a writ of habeas corpus without giving a plenary evidentiary hearing to examine the voluntariness of the confessional statements. Both the majority opinion as well as the dissenting opinion (Stewart, J.) concurred on the finding that a confession induced by the administration of drugs is constitutionally inadmissible in a criminal trial. On this issue, Warren, C.J. observed at US pp. 307-09: (*Townsend case*²⁴, L Ed pp. 782-83)

- "Numerous decisions of this Court have established the standards governing the admissibility of confessions into evidence. If an individual's 'will was overborne' or 'if his confession was not 'the product of a rational intellect and a free will', his confession is inadmissible because coerced. These standards are applicable whether a confession is the product of physical intimidation or psychological

²⁴ 9 L Ed 2d 770 : 372 US 293 (1962)

²⁵ 50(2) *The Journal of Criminal Law, Criminology and Police Science* 118-123 (July-August 1959)

pressure and, of course, are equally applicable to a drug-induced statement. It is difficult to imagine a situation in which a confession would be less the product of a free intellect, less voluntary, than when brought about by a drug having the effect of a 'truth serum'. It is not significant that the drug may have been administered and the questions asked by persons unfamiliar with hyoscine's properties as a 'truth serum', if these properties exist. Any questioning by police officers which *in fact* produces a confession which is not the product of a free intellect renders that confession inadmissible."

(internal citations omitted) (emphasis in original)

60. In *United States v. Swanson*²⁶, two individuals had been convicted for conspiracy and extortion through the acts of sending threatening letters. At the trial stage, one of the defendants testified that he suffered from amnesia and therefore he could not recall his alleged acts of telephoning the co-defendant and mailing threatening letters. In order to prove such amnesia his counsel sought the admission of a taped interview between the defendant and a psychiatrist which had been conducted while the defendant was under the influence of sodium amytal. The drug-induced statements supposedly showed that the scheme was a joke or a prank. The trial court refused to admit the contents of this sodium amytal induced interview and the Fifth Circuit Court upheld this decision. In holding the same, it was also observed, *ibid.* at p. 528:

"... Moreover, no drug-induced recall of past events which the subject is otherwise unable to recall is any more reliable than the procedure for inducing recall. Here both psychiatrists testified that sodium amytal does not ensure truthful statements. No recreation or recall, by photograph, demonstration, drug-stimulated recall, or otherwise, would be admissible with so tenuous a predicate."

61. A decision given by the Ninth Circuit Court in *United States v. Solomon*²⁷, has been cited by the respondents to support the forensic uses of the narcoanalysis technique. However, a perusal of that judgment shows that neither the actual statements made during narcoanalysis interviews nor the expert testimony relating to the same were given any weightage. The facts were that three individuals, namely, Solomon, Wesley and George (a minor at the time of the crime) were accused of having committed robbery and murder by arson. After their arrest, they had changed their statements about the events relating to the alleged offences. Subsequently, Wesley gave his consent for a sodium amytal induced interview and the same was administered by a psychiatrist named Dr. Montgomery. The same psychiatrist also conducted a sodium amytal interview with George at the request of the investigators. At the trial stage, George gave testimony which proved to be incriminatory for Solomon and Wesley. However, the statements made by Wesley during the narcoanalysis interview were not admitted as evidence and even the expert testimony about the same was excluded.

²⁶ 572 F 2d 523 (5th Cir 1978)

²⁷ 753 F 2d 1522 (9th Cir 1985)

62. On appeal, the Ninth Circuit Court held that there had been no abuse of discretion by the trial court in considering the evidence before it. Solomon and Wesley had contended that the trial court should have excluded the testimony given by George before the trial Judge since the same was based on the results of the sodium amytal interview and was hence unreliable. The court drew a distinction between the statements made during the narcoanalysis interview and the subsequent statements made before the trial court. It was observed that it was open to the defendants to show that George's testimony during trial had been bolstered by the previous revelations made during the narcoanalysis interview. However, the connection between the drug-induced revelations and the testimony given before the trial court could not be presumed. It was further noted, *ibid.* at p. 1525: (*Solomon case*²⁷)

"The only Ninth Circuit case addressing narcoanalysis excluded a recording of and psychiatric testimony supporting an interview conducted under the influence of sodium pentothal, a precursor of sodium amytal. [*Lindsey v. United States*²².]

The case at Bar is distinguishable because no testimony concerning the narcoanalysis was offered at trial. Only George's current recollection of events was presented.

In an analogous situation, this circuit has held that the current recollections of witnesses whose memories have been refreshed by hypnosis are admissible, with the fact of hypnosis relevant to credibility only [*United States v. Adams*²⁸, F 2d at pp. 198-99.], *cert. denied*. We have cautioned, however, that 'great care must be exercised to insure' that statements after hypnosis are not the product of hypnotic suggestion. *Id.*

We find no abuse of discretion in the trial court's ruling to admit the testimony of the witness George. The court's order denying Solomon's Motion to Suppress reflects a careful balancing of reliability against prejudicial dangers:"

63. However, Wesley wanted to introduce expert testimony by Dr. Montgomery which would explain the effects of sodium amytal as well as the statements made during his own drug-induced interview. The intent was to rehabilitate Wesley's credibility after the prosecution had impeached it with an earlier confession. The trial court had held that even though narcoanalysis was not reliable enough to admit into evidence, Dr. Montgomery could testify about the statements made to him by Wesley, however, without an explanation of the circumstances. On this issue, the Ninth Circuit Court referred to the *Frye*³ standard for the admissibility of scientific evidence. It was also noted that the trial court had the discretion to draw the necessary balance between the probative value of the evidence and its prejudicial effect.

²⁷ *United States v. Solomon*, 753 F 2d 1522 (9th Cir 1985)

²² 237 F 2d 893 (9th Cir 1956)

²⁸ 581 F 2d 193 (9th Cir 1978)

³ *Frye v. United States*, 54 App DC 46 (1923)

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(2010) 7 SCC

It again took note of the decision in *Lindsey v. United States*²² where the admission of a tape recording of a narcoanalysis interview along with an expert's explanation of the technique was held to be a prejudicial error. The following conclusion was stated: (F 2d p. 1526) a

"Dr. Montgomery testified also that narcoanalysis is useful as a source of information that can be valuable if verified through other sources. At one point he testified that it would elicit an accurate statement of subjective memory, but later said that the subject could fabricate memories. He refused to agree that the subject would be more likely to tell the truth under narcoanalysis than if not so treated." b

Wesley wanted to use the psychiatric testimony to bolster the credibility of his trial testimony that George started the fatal fire. Wesley's statement shortly after the fire was that he himself set the fire. The probative value of the statement while under narcoanalysis that George was responsible, was the drug's tendency to induce truthful statements. c

Montgomery admitted that narcoanalysis does not reliably induce truthful statements. The judge's exclusion of the evidence concerning narcoanalysis was not an abuse of discretion. The prejudicial effect of an aura of scientific respectability outweighed the slight probative value of the evidence." d

64. In *State of New Jersey v. Daryll Pitts*²⁹, the trial court had refused to admit a part of a psychiatrist's testimony which was based on the results of the defendant's sodium amytal induced interview. The defendant had been charged with murder and had sought reliance on the testimony to show his unstable state of mind at the time of the homicides. Reliance on the psychiatrist's testimony was requested during the sentencing phase of the trial in order to show a mitigating factor. On appeal, the Supreme Court of New Jersey upheld the trial court's decision to exclude that part of the testimony which was derived from the results of the sodium amytal interview. e

65. Reference was made to the *Frye*³ standard while observing that "in determining the admissibility of evidence derived from scientific procedures, a court must first ascertain the extent to which the reliability of such procedures has attained general acceptance within the relevant scientific community." (*ibid.* at p. 1344) f

Furthermore, the expert witnesses who had appeared at the trial had given conflicting accounts about the utility of a sodium amytal induced interview for ascertaining the mental state of a subject with regard to past events. It was stated, *ibid.* at p. 1348: g

"On the two occasions that this Court has considered the questions, we have concluded, based on the then existing state of scientific

22 237 F 2d 893 (9th Cir 1956) h

29 56 A 2d 1320 (NJ 1989)

3 *Frye v. United States*, 54 App DC 46 (1923)

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a knowledge, that testimony derived from a sodium amytal induced interview is inadmissible to prove the truth of the facts asserted. [See *State v. Levitt*³⁰, NJ at p. 275; *State v. Sinnott*³¹.] Our rule is consistent with the views expressed by other courts that have addressed the issue.

b "...The expert testimony adduced at the Rule 8 hearing indicated that the scientific community continues to view testimony induced by sodium amytal as unreliable to ascertain truth. Thus, the trial court's ruling excluding Dr. Sadoff's testimony in the guilt phase was consistent with our precedents, with the weight of authority throughout the country, and also with contemporary scientific knowledge as reflected by the expert testimony. ..."

(internal citations omitted)

c 66. Since a person subjected to the narcoanalysis technique is in a half-conscious state and loses awareness of time and place, this condition can be compared to that of a person who is in a hypnotic state. In *Horvath v. R.*³² the Supreme Court of Canada held that statements made in a hypnotic state were not voluntary and hence they cannot be admitted as evidence. It was also decided that if the post-hypnotic statements relate back to the contents of what was said during the hypnotic state, the subsequent statements would be inadmissible. In that case a 17-year-old boy suspected for the murder of his mother had been questioned by a police officer who had training in the use of hypnotic methods. During the deliberate interruptions in the interrogation sessions, the boy had fallen into a mild hypnotic state and had eventually confessed to the commission of the murder. He later repeated the admissions before the investigating officers and signed a confessional statement. The trial Judge had found all of these statements to be inadmissible, thereby leading to an acquittal. The Court of Appeal had reversed this decision, and hence an appeal was made before the Supreme Court. Notably, the appellant had refused to undergo a narcoanalysis interview or a polygraph test. It was also evident that he had not consented to the hypnosis. The multiple opinions delivered in the case examined the criterion for deciding the voluntariness of a statement. Reference was made to the well-known statement of Lord Summer in *Ibrahim v. R.*³³, at AC p. 609:

f "It has long been established as a positive rule of English criminal law, that no statement made by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority."

g 67. In *Horvath v. R.*³² the question was whether statements made under a hypnotic state could be equated with those obtained by "fear of prejudice" or "hope of advantage". The Court ruled that the inquiry into the voluntariness of a statement should not be literally confined to these expressions. After

30 36 NJ 266 (1961)

31 132 A 2d 298 (1957)

32 (1979) 44 CCC 2d 385 : (1979) 2 SCR 376 (Can SC)

33 1914 AC 599 : (1914-15) All ER Rep 874 (PC)

examining several precedents, Spence, J. held that the total circumstances surrounding the interrogation should be considered, with no particular emphasis placed on the hypnosis. It was observed that in this particular case the interrogation of the accused had resulted in his complete emotional disintegration, and hence the statements given were inadmissible. It was also held that the rule in *Ibrahim v. R.*³³ that a statement must be induced by "fear of prejudice" or "hope of advantage" in order to be considered involuntary was not a comprehensive test. The word "voluntary" should be given its ordinary and natural meaning so that the circumstances which existed in the present case could also be described as those which resulted in involuntary statements.

68. In a concurring opinion Beetz, J. drew a comparison between statements made during hypnosis and those made under the influence of a sodium amytal injection. It was observed at para 91:

"91. Finally, voluntariness is incompatible not only with promises and threats but actual violence. Had Horvath made a statement while under the influence of an amytal injection administered without his consent, the statement would have been inadmissible because of the assault, and presumably because also of the effect of the injection on his mind. There was no physical violence in the case at bar. There is not even any evidence of bodily contact between Horvath and Sergeant Proke, but through the use of an interrogation technique involving certain physical elements such as a hypnotic quality of voice and manner, a police officer has gained unconsented access to what in a human being is of the utmost privacy, the privacy of his own mind. As I have already indicated, it is my view that this was a form of violence or intrusion of a moral or mental nature, more subtle than visible violence but not less efficient in the result than an amytal injection administered by force."

69. In this regard, the following observations are instructive for deciding the questions before us at paras 117, 118:

"117. It would appear that hypnosis and narcoanalysis are used on a consensual basis by certain police forces as well as by the defence, and it has been argued that they can serve useful purposes.

118. I refrain from commenting on such practices, short of noting that even the consensual use of hypnosis and narcoanalysis for evidentiary purposes may present problems. Under normal police interrogation, a suspect has the opportunity to renew or deny his consent to answer each question, which is no longer the case once he is, although by consent, in a state of hypnosis or under the influence of a 'truth serum'." (internal citation omitted)

70. Our attention has also been drawn to the decision reported as *Rock v. Arkansas*³⁴ in which the US Supreme Court ruled that hypnotically refreshed testimony could be admitted as evidence. The constitutional basis for

33 1914 AC 599 : (1914-15) All ER Rep 874 (PC)

34 97 L Ed 2d 37 : 483 US 44 (1987)

- a admitting such testimony was the Sixth Amendment which gives every person a right to present a defence in criminal cases. However, the crucial aspect was that the trial court had admitted the oral testimony given during the trial stage rather than the actual statements made during the hypnosis session conducted earlier during the investigation stage. It was found that such hypnotically refreshed testimony was the only defence available to the defendant in the circumstances. In such circumstances, it would of course be open to the prosecution to contest the reliability of the testimony given during the trial stage by showing that it had been bolstered by the statements made during hypnosis.

- b 71. It may be recalled that a similar line of reasoning had been adopted in *United States v. Solomon*²⁷, where for the purpose of admissibility of testimony, a distinction had been drawn between the statements made during a narcoanalysis interview and the oral testimony given during the trial stage which was allegedly based on the drug-induced statements. Hence, the weight of precedents indicates that both the statements made during narcoanalysis interviews as well as expert testimony relating to the same have not been given weightage in criminal trials.

Brain Electrical Activation Profile (BEAP) test

- d 72. The third technique in question is the "Brain Electrical Activation Profile test", also known as the "P300 waves test". It is a process of detecting whether an individual is familiar with certain information by way of measuring activity in the brain that is triggered by exposure to selected stimuli. This test consists of examining and measuring "event-related potentials" (ERP) i.e. electrical wave forms emitted by the brain after it has absorbed an external event. An ERP measurement is the recognition of specific patterns of electrical brain activity in a subject that are indicative of certain cognitive mental activities that occur when a person is exposed to a stimulus in the form of an image or a concept expressed in words. The measurement of the cognitive brain activity allows the examiner to ascertain whether the subject recognised stimuli to which he/she was exposed. [Cited from Andre A. Moenssens, "Brain Fingerprinting—Can it be Used to Detect the Innocence of Persons Charged with a Crime?"³⁵, *University of Missouri at Kansas City Law Review* at p. 893.]

- e 73. By the late 19th century it had been established that the brain functioned by emitting electrical impulses and the technology to measure them was developed in the form of the electroencephalograph (EEG) which is now commonly used in the medical field. Brain wave patterns observed through an EEG scan are fairly crude and may reflect a variety of unrelated brain activity functions. It was only with the development of computers that it became possible to sort out specific wave components on an EEG and identify the correlation between the waves and specific stimuli. The P300 wave is one such component that was discovered by Dr. Samuel Sutton in

h 27 753 F 2d 1522 (9th Cir 1985)
35 70 *University of Missouri at Kansas City Law Review* 891-920 (Summer 2002)

1965. It is a specific event-related brain potential (ERP) which is triggered when information relating to a specific event is recognised by the brain as being significant or surprising.

74. The P300 waves test is conducted by attaching electrodes to the scalp of the subject, which measure the emission of the said wave components. The test needs to be conducted in an insulated and air-conditioned room in order to prevent distortions arising out of weather conditions. Much like the narcoanalysis technique and polygraph examination, this test also requires effective collaboration between the investigators and the examiner, most importantly for designing the stimuli which are called "probes". Ascertaining the subject's familiarity with the "probes" can help in detecting deception or to gather useful information. The test subject is exposed to auditory or visual stimuli (words, sounds, pictures, videos) that are relevant to the facts being investigated alongside other irrelevant words and pictures. Such stimuli can be broadly classified as "material probes" and "neutral probes". The underlying theory is that in the case of guilty suspects, the exposure to the material probes will lead to the emission of P300 wave components which will be duly recorded by the instruments. By examining the records of these wave components the examiner can make inferences about the individual's familiarity with the information related to the crime. [Refer *Laboratory Procedure Manual—Brain Electrical Activation Profile* (Directorate of Forensic Science, Ministry of Home Affairs, Government of India, New Delhi, 2005).]

75. The P300 waves test was the precursor to other neuroscientific techniques such as "brain fingerprinting" developed by Dr. Lawrence Farwell. The latter technique has been promoted in the context of criminal justice and has already been the subject of litigation. There is an important difference between the "P300 waves test" that has been used by the forensic science laboratories in India and the "brain fingerprinting" technique. Dr. Lawrence Farwell has argued that the P300 wave component is not an isolated sensory brain effect but it is part of a longer response that continues to take place after the initial P300 stimulus has occurred. This extended response bears a correlation with the cognitive processing that takes place slightly beyond the P300 wave and continues in the range of 300-800 milliseconds after the exposure to the stimulus. This extended brain wave component has been named as the MERMER (Memory and encoding related multifaceted electroencephalographic response) effect. [See generally Lawrence A. Farwell, *Brain Fingerprinting: A New Paradigm in Criminal Investigations and Counter-Terrorism* (2001).³⁶]

76. The functional magnetic resonance imaging (fMRI) is another neuroscientific technique whose application in the forensic setting has been contentious. It involves the use of MRI scans for measuring blood flow between different parts of the brain which bears a correlation to the subject's truthfulness or deception. fMRI-based lie detection has also been advocated

36 Text can be downloaded from <www.brainwavescience.com>

- a as an aid to interrogations in the context of counter-terrorism and intelligence operations, but it prompts the same legal questions that can be raised with respect to all of the techniques mentioned above. Even though these are non-invasive techniques the concern is not so much with the manner in which they are conducted but the consequences for the individuals who undergo the same. The use of techniques such as “brain fingerprinting” and “fMRI-based lie detection” raise numerous concerns such as those of protecting mental privacy and the harms that may arise from inferences made about the subject’s truthfulness or familiarity with the facts of a crime. [See generally
- b Michael S. Pardo, “Neuroscience Evidence, Legal Culture and Criminal Procedure”³⁷; Sarah E. Stoller and Paul Root Wolpe, “Emerging Neurotechnologies for Lie Detection and the Fifth Amendment”³⁸.]

- c 77. These neuroscientific techniques could also find application outside the criminal justice setting. For instance, Henry T. Greely (2005, cited below) has argued that technologies that may enable a precise identification of the subject’s mental responses to specific stimuli could potentially be used for market research by business concerns for surveying customer preferences and developing targeted advertising schemes. They could also be used to judge mental skills in the educational and employment related settings since cognitive responses are often perceived to be linked to academic and professional competence. One can foresee the potential use of this technique
- d to distinguish between students and employees on the basis of their cognitive responses. There are several other concerns with the development of these “mind-reading” technologies especially those relating to the privacy of individuals. [Refer Henry T. Greely, “Chapter 17: The Social Effects of Advances in Neuroscience: Legal Problems, Legal Perspectives” in Judy Illes (ed.), *Neuroethics—Defining the Issues in Theory, Practice and Policy* (Oxford University Press, 2005) at pp. 245-63.]
- e

- f 78. Even though the P300 wave component has been the subject of considerable research, its uses in the criminal justice system have not received much scholarly attention. Dr. Lawrence Farwell “brain fingerprinting”³⁶ technique has attracted considerable publicity but has not been the subject of any rigorous independent study. Besides this preliminary doubt, an important objection is centred on the inherent difficulty of designing the appropriate “probes” for the test. Even if the “probes” are prepared by an examiner who is thoroughly familiar with all aspects of the facts being investigated, there is always a chance that a subject may have had prior exposure to the material probes. In case of such prior exposure, even if
- g the subject is found to be familiar with the probes, the same will be meaningless in the overall context of the investigation. For example, in the aftermath of crimes that receive considerable media attention the subject can be exposed to the test stimuli in many ways. Such exposure could occur by way of reading about the crime in newspapers or magazines, watching television, listening to the radio or by word of mouth. A possibility of prior

- h 37 33 American Journal of Criminal Law 301-337 (Summer 2006)
38 33 American Journal of Law and Medicine 359-375 (2007)
36 Text can be downloaded from <www.brainwavescience.com>

exposure to the stimuli may also arise if the investigators unintentionally reveal crucial facts about the crime to the subject before conducting the test. The subject could also be familiar with the content of the material probes for several other reasons. a

79. Another significant limitation is that even if the tests demonstrate familiarity with the material probes, there is no conclusive guidance about the actual nature of the subject's involvement in the crime being investigated. For instance a bystander who witnessed a murder or robbery could potentially be implicated as an accused if the test reveals that the said person was familiar with the information related to the same. Furthermore, in cases of amnesia or "memory-hardening" on part of the subject, the tests could be blatantly misleading. Even if the inferences drawn from the "P300 waves test" are used for corroborating other evidence, they could have a material bearing on a finding of guilt or innocence despite being based on an uncertain premise. [For an overview of the limitations of these neuroscientific techniques, see John G. New, "If You Could Read My Mind—Implications of Neurological Evidence for Twenty-First Century Criminal Jurisprudence"³⁹.] b

80. We have come across two precedents relatable to the use of "brain fingerprinting" tests in criminal cases. Since this technique is considered to be an advanced version of the P300 waves test, it will be instructive to examine these precedents. c

81. In *Harrington v. State*⁴⁰, Terry, J. Harrington (appellant) had been convicted for murder in 1978 and the same had allegedly been committed in the course of an attempted robbery. A crucial component of the incriminating materials was the testimony of his accomplice. However, many years later it emerged that the accomplice's testimony was prompted by an offer of leniency from the investigating police and doubts were raised about the credibility of other witnesses as well. Subsequently it was learnt that at the time of the trial, the police had not shared with the defence some investigative reports that indicated the possible involvement of another individual in the said crime. Harrington had also undergone a "brain fingerprinting" test under the supervision of Dr. Lawrence Farwell. The test results showed that he had no memories of the "probes" relating to the act of murder. Hence, Harrington approached the District Court seeking the vacation of his conviction and an order for a new trial. The post-conviction relief was sought on the grounds of newly discovered evidence which included recantation by the prosecution's primary witness, the past suppression of police investigative reports which implicated another suspect and the results of the "brain fingerprinting" tests. However, the District Court denied this application for post-conviction relief. This was followed by an appeal before the Supreme Court of Iowa. d

39 29 Journal of Legal Medicine 179-197 (April-June 2008)

40 659 NW 2d 509 (2003) (Iowa SC)

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82. The appellate court in *Harrington v. State*⁴⁰ concluded that Harrington's appeal was timely and his action was not time-barred. The appellant was granted relief in light of a "due process" violation i.e. the failure on part of the prosecution at the time of the original trial to share the investigative reports with the defence. It was observed that the defendant's right to a fair trial had been violated because the prosecution had suppressed evidence which was favourable to the defendant and clearly material to the issue of guilt. Hence the case was remanded back to the District Court.
- However, the Supreme Court of Iowa gave no weightage to the results of the "brain fingerprinting" test and did not even inquire into their relevance or reliability. In fact it was stated:

"Because the scientific testing evidence is not necessary to a resolution of this appeal, we give it no further consideration." [NW 2d at p. 516]

83. The second decision brought to our attention is *Slaughter v. Oklahoma*⁴¹. In that case, Jimmy Ray Slaughter had been convicted for two murders and sentenced to death. Subsequently, he filed an application for post-conviction relief before the Court of Criminal Appeals of Oklahoma which attempted to introduce in evidence an affidavit and evidentiary materials relating to a "brain fingerprinting" test. This test had been conducted by Dr. Lawrence Farwell whose opinion was that the petitioner did not have knowledge of the "salient features of the crime scene". Slaughter also sought a review of the evidence gathered through DNA testing and challenged the bullet composition analysis pertaining to the crime scene. However, the appellate court denied the application for post-conviction relief as well as the motion for an evidentiary hearing. With regard to the affidavits based on the "brain fingerprinting" test, it was held, *ibid.* at p. 834:

"10. Dr. Farwell makes certain claims about the brain fingerprinting test that are not supported by anything other than his bare affidavit. He claims the technique has been extensively tested, has been presented and analyzed in numerous peer review articles in recognized scientific publications, has a very low rate of error, has objective standards to control its operation, and is generally accepted within the 'relevant scientific community'. These bare claims, however, without any form of corroboration, are unconvincing and, more importantly, legally insufficient to establish the petitioner's post-conviction request for relief. The petitioner cites one published opinion, *Harrington v. State*⁴⁰, in which a brain fingerprinting test result was raised as error and discussed by the Iowa Supreme Court ('a novel computer-based brain testing'). However, while the lower court in Iowa appears to have admitted the evidence under non-*Daubert*⁴ circumstances, the test did not ultimately factor into the Iowa Supreme Court's published decision in any way."

⁴⁰ 659 NW 2d 509 (2003) (Iowa SC)

⁴¹ 105 P 3d 832 (2005)

⁴ *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 125 L. Ed 2d 469 : 509 US 579 (1993)

Accordingly, the following conclusion was stated, *ibid.* at p. 836:

"18. Therefore, based upon the evidence presented, we find the brain fingerprinting evidence is procedurally barred under the Act and our prior cases, as it could have been raised in the petitioner's direct appeal and, indeed, in his first application for post-conviction relief. We further find a lack of sufficient evidence that would support a conclusion that the petitioner is factually innocent or that brain fingerprinting, based solely upon the MERMER effect, would survive a *Daubert*⁴ analysis."

Contentious issues in the present case

84. As per the Laboratory Procedure Manuals, the impugned tests are being conducted at the direction of the jurisdictional courts even without obtaining the consent of the intended test subjects. In most cases these tests are conducted conjunctively wherein the veracity of the information revealed through narcoanalysis is subsequently tested through a polygraph examination or the BEAP test. In some cases the investigators could first want to ascertain the capacity of the subject to deceive (through polygraph examination) or his/her familiarity with the relevant facts (through BEAP test) before conducting a narcoanalysis interview. Irrespective of the sequence in which these techniques are administered, we have to decide on their permissibility in circumstances where any of these tests are compulsorily administered, either independently or conjunctively.

85. It is plausible that investigators could obtain statements from individuals by threatening them with the possibility of administering either of these tests. The person being interrogated could possibly make self-incriminating statements on account of apprehensions that these techniques will extract the truth. Such behaviour on the part of the investigators is more likely to occur when the person being interrogated is unaware of his/her legal rights or is intimidated for any other reason. It is a settled principle that a statement obtained through coercion, threat or inducement is involuntary and hence inadmissible as evidence during trial. However, it is not settled whether a statement made on account of the apprehension of being forcibly subjected to the impugned tests will be involuntary and hence inadmissible. This aspect merits consideration. It is also conceivable that an individual who has undergone either of these tests would be more likely to make self-incriminating statements when he/she is later confronted with the results. The question in that regard is whether the statements that are made subsequently should be admissible as evidence. The answers to these questions rest on the permissibility of subjecting individuals to these tests without their consent.

I. Whether the involuntary administration of the impugned techniques violates the "right against self-incrimination" enumerated in Article 20(3) of the Constitution?

86. The investigators could seek reliance on the impugned tests to extract information from a person who is suspected or accused of having committed

⁴ *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 125 L Ed 2d 469 : 509 US 579 (1993)

- a a crime. Alternatively, these tests could be conducted on witnesses to aid investigative efforts. As mentioned earlier, this could serve several objectives, namely, those of gathering clues which could lead to the discovery of relevant evidence, to assess the credibility of previous testimony or even to ascertain the mental state of an individual. With these uses in mind, we have to decide whether the compulsory administration of these tests violates the “right against self-incrimination” which finds place in Article 20(3) of the Constitution of India. Along with the “rule against double jeopardy” and the
- b “rule against retrospective criminalisation” enumerated in Article 20, it is one of the fundamental protections that controls interactions between individuals and the criminal justice system. Article 20(3) reads as follows:

“20. (3) No person accused of any offence shall be compelled to be a witness against himself.”

- c 87. The interrelationship between the “right against self-incrimination” and the “right to fair trial” has been recognised in most jurisdictions as well as international human rights instruments. For example, the US Constitution incorporates the “privilege against self-incrimination” in the text of its Fifth Amendment. The meaning and scope of this privilege has been judicially moulded by recognising its interrelationship with other constitutional rights
- d such as the protection against “unreasonable search and seizure” (Fourth Amendment) and the guarantee of “due process of law” (Fourteenth Amendment). In the International Covenant on Civil and Political Rights, 1966, Article 14(3)(g) enumerates the minimum guarantees that are to be accorded during a trial and states that everyone has a right not to be compelled to testify against himself or to confess guilt. In the European
- e Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, Article 6(1) states that every person charged with an offence has a right to a fair trial and Article 6(2) provides that “everybody charged with a criminal offence shall be presumed innocent until proved guilty according to law”. The guarantee of “presumption of innocence” bears a direct link to the
- f “right against self-incrimination” since compelling the accused person to testify would place the burden of proving innocence on the accused instead of requiring the prosecution to prove guilt.

- g 88. In the Indian context, Article 20(3) should be construed with due regard for the interrelationship between rights, since this approach was recognised in *Maneka Gandhi case*⁴². Hence, we must examine the “right against self-incrimination” in respect of its relationship with the multiple

- h dimensions of “personal liberty” under Article 21, which include guarantees such as the “right to fair trial” and “substantive due process”.
89. It must also be emphasised that Articles 20 and 21 have a non-derogable status within Part III of our Constitution because the Constitution (Forty-fourth Amendment) Act, 1978 mandated that the right to move any court for the enforcement of these rights cannot be suspended

even during the operation of a Proclamation of Emergency. In this regard, Article 359(1) of the Constitution of India reads as follows:

"359. Suspension of the enforcement of the rights conferred by Part III during Emergencies.—(1) Where a Proclamation of Emergency is in operation, the President may by order declare that the right to move any court for the enforcement of such of the rights conferred by Part III (except Articles 20 and 21) as may be mentioned in the order and all proceedings pending in any court for the enforcement of the rights so mentioned shall remain suspended for the period during which the Proclamation is in force or for such shorter period as may be specified in the order."

90. Undoubtedly, Article 20(3) has an exalted status in our Constitution and questions about its meaning and scope deserve thorough scrutiny. In one of the impugned judgments, it was reasoned that all citizens have an obligation to cooperate with ongoing investigations. For instance reliance has been placed on Section 39 CrPC which places a duty on citizens to inform the nearest Magistrate or police officer if they are aware of the commission of, or of the intention of any other person to commit the crimes enumerated in the section. Attention has also been drawn to the language of Section 156(1) CrPC which states that a police officer in charge of a police station is empowered to investigate cognizable offences even without an order from the jurisdictional Magistrate. Likewise, our attention was drawn to Section 161(1) CrPC which empowers the police officer investigating a case to orally examine any person who is supposed to be acquainted with the facts and circumstances of the case. While the overall intent of these provisions is to ensure the citizens' cooperation during the course of investigation, they cannot override the constitutional protections given to the accused persons. The scheme of CrPC itself acknowledges this hierarchy between constitutional and statutory provisions in this regard. For instance, Section 161(2) CrPC prescribes that when a person is being examined by a police officer, he is not bound to answer such questions, the answers of which would have a tendency to expose him to a criminal charge or a penalty or forfeiture.

91. Not only does an accused person have the right to refuse to answer any question that may lead to incrimination, there is also a rule against adverse inferences being drawn from the fact of his/her silence. At the trial stage, Section 313(3) CrPC places a crucial limitation on the power of the court to put questions to the accused so that the latter may explain any circumstances appearing in the evidence against him. It lays down that the accused shall not render himself/herself liable to punishment by refusing to answer such questions, or by giving false answers to them. Further, proviso (b) to Section 315(1) CrPC mandates that even though an accused person can be a competent witness for the defence, his/her failure to give evidence shall not be made the subject of any comment by any of the parties or the court or give rise to any presumption against himself or any person charged together with him at the same trial. It is evident that Section 161(2) CrPC enables a person to choose silence in response to questioning by a police officer during

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- a the stage of investigation, and as per the scheme of Section 313(3) and proviso (b) to Section 315(1) of the Code, adverse inferences cannot be drawn on account of the accused person's silence during the trial stage.

Historical origins of the "right against self-incrimination"

- b 92. The right of refusal to answer questions that may incriminate a person is a procedural safeguard which has gradually evolved in common law and bears a close relation to the "right to fair trial". There are competing versions about the historical origins of this concept. Some scholars have identified the origins of this right in the medieval period. In that account, it was a response to the procedure followed by English judicial bodies such as the Star Chamber and the High Commissions which required the defendants and suspects to take ex officio oaths. These bodies mainly decided cases involving religious non-conformism in a Protestant dominated society, as well as offences like treason and sedition. Under an ex officio oath the defendant was required to answer all questions posed by the Judges and prosecutors during the trial and the failure to do so would attract punishments that often involved physical torture. It was the resistance to this practice of compelling the accused to speak which led to demands for a "right to silence".

- d 93. In an academic commentary, Leonard Levy (1969) had pointed out that the doctrinal origins of the right against self-incrimination could be traced back to the Latin maxim *nemo tenetur seipsum prodere* (i.e. no one is bound to accuse himself) and the evolution of the concept of "due process of law" enumerated in the Magna Carta. [Refer Leonard Levy, "The Right against Self-Incrimination: History and Judicial History"⁴³.]

- e 94. The use of the ex officio oath by the ecclesiastical courts in medieval England had come under criticism from time to time, and the most prominent cause for discontentment came with its use in the Star Chamber and the High Commissions. Most scholarship has focussed on the sedition trial of John Lilburne (a vocal critic of Charles I, the then monarch) in 1637, when he refused to answer questions put to him on the ground that he had not been informed of the contents of the written complaint against him. John Lilburne went on to vehemently oppose the use of ex officio oaths, and the Parliament of the time relented by abolishing the Star Chamber and the High Commission in 1641. This event is regarded as an important landmark in the evolution of the "right to silence".

- g 95. However, in 1648 a Special Committee of Parliament conducted an investigation into the loyalty of Members whose opinions were offensive to the army leaders. The Committee's inquisitional conduct and its requirement that witnesses take an oath to tell the truth provoked opponents to condemn what they regarded as a revival of the Star Chamber tactics. John Lilburne was once again tried for treason before this Committee, this time for his outspoken criticism of the leaders who had prevailed in the struggle between the supporters of the monarch and those of Parliament in the English Civil

43 84(1) Political Science Quarterly 1-29 (March 1969)

War. John Lilburne invoked the spirit of the Magna Carta as well as the 1628 Petition of Right to argue that even after common law indictment and without oath, he did not have to answer questions against or concerning himself. He drew a connection between the right against self-incrimination and the guarantee of a fair trial by invoking the idea of "due process of law" which had been stated in the Magna Carta.

96. John H. Langbein (1994) has offered more historical insights into the emergence of the "right to silence". [John H. Langbein, "The Historical Origins of the Privilege against Self-Incrimination at Common Law"⁴⁴.] He draws attention to the fact that even though ex officio oaths were abolished in 1641, the practice of requiring the defendants to present their own defence in criminal proceedings continued for a long time thereafter.

97. The Star Chamber and the High Commissions had mostly tried cases involving religious non-conformists and political dissenters, thereby attracting considerable criticism. Even after their abolition, the defendants in criminal courts did not have the right to be represented by a lawyer ("right to counsel") or the right to request the presence of the defence witnesses ("right of compulsory process"). Hence, the defendants were more or less compelled to testify on their own behalf. Even though the threat of physical torture on account of remaining silent had been removed, the defendant would face a high risk of conviction if he/she did not respond to the charges by answering the material questions posed by the Judge and the prosecutor. In presenting his/her own defence during the trial, there was a strong likelihood that the contents of such testimony could strengthen the case of the prosecution and lead to conviction.

98. With the passage of time, the right of a criminal defendant to be represented by a lawyer eventually emerged in the common law tradition. A watershed in this regard was the Treason Act of 1695 (c. 3) which provided for a "right to counsel" as well as "compulsory process" in cases involving offences such as treason. Gradually, the right to be defended by a counsel was extended to more offences, but the role of the counsel was limited in the early years. For instance the defence lawyers could only help their clients with questions of law and could not make submissions related to the facts.

99. The practice of requiring the accused persons to narrate or contest the facts on their own corresponds to a prominent feature of an inquisitorial system i.e. the testimony of the accused is viewed as the "best evidence" that can be gathered. The premise behind this is that innocent persons should not be reluctant to testify on their own behalf. This approach was followed in the inquisitorial procedure of the ecclesiastical courts and had thus been followed in other courts as well. The obvious problem with compelling the accused to testify on his own behalf is that an ordinary person lacks the legal training to effectively respond to suggestive and misleading questioning, which could come from the prosecutor or the Judge. Furthermore, even an innocent person is at an inherent disadvantage in an environment where there may be unintentional irregularities in the testimony. Most importantly the

44 92(5) Michigan Law Review 1047-1085 (March 1994)

a burden of proving innocence by refuting the charges was placed on the defendant himself. In the present day, the inquisitorial conception of the defendant being the best source of evidence has long been displaced with the evolution of adversarial procedure in the common law tradition.

b 100. Criminal defendants have been given protections such as the presumption of innocence, right to counsel, the right to be informed of charges, the right of compulsory process and the standard of proving guilt beyond reasonable doubt among others. It can hence be stated that it was only with the subsequent emergence of the "right to counsel" that the accused's "right to silence" became meaningful. With the consolidation of the role of the defence lawyers in criminal trials, a clear segregation emerged between the testimonial function performed by the accused and the defensive function performed by the lawyer. This segregation between the testimonial and defensive functions is now accepted as an essential feature of a fair trial so as to ensure a level playing field between the prosecution and the defence. c In addition to a defendant's "right to silence" during the trial stage, the protections were extended to the stage of pre-trial inquiry as well. With the enactment of the Sir John Jervis Act of 1848, provisions were made to advise the accused that he might decline to answer questions put to him in the pre-trial inquiry and to caution him that his answers to pre-trial interrogation d might be used as evidence against him during the trial stage.

101. The judgment in *Nandini Satpathy v. P.L. Dani*⁴⁵, referred to the following extract from a decision of the US Supreme Court in *Brown v. Walker*⁴⁶, which had later been approvingly cited by Warren, C.J. in *Miranda v. Arizona*⁴⁷: (*Nandini Satpathy case*⁴⁵, SCC pp. 438-39, para 31)

e "31. ... 'The maxim *nemo tenetur seipsum accusare* had its origin in a protest against the inquisitorial and manifestly unjust methods of interrogating accused persons, which have long obtained in the continental system, and, until the expulsion of the Stuarts from the British throne in 1688, and the erection of additional barriers for the protection of the people against the exercise of arbitrary power, were not uncommon even in England. While the admissions or confessions of the f prisoner, when voluntarily and freely made, have always ranked high in the scale of incriminating evidence, if an accused person be asked to explain his apparent connection with a crime under investigation, the ease with which the questions put to him may assume an inquisitorial character, the temptation to press the witness unduly, to browbeat him if he be timid or reluctant, to push him into a corner, and to entrap him into g fatal contradictions, which is so painfully evident in many of the earlier State trials, notably in those of Sir Nicholas Throckmorton, and Udal, the Puritan Minister, made the system so odious as to give rise to a demand for its total abolition. The change in the English criminal procedure in that particular seems to be founded upon no statute and no judicial

h 45 (1978) 2 SCC 424 : 1978 SCC (Cri) 236

46 40 L Ed 819 : 161 US 591 (1895)

47 16 L Ed 2d 694 : 384 US 436 (1965)

opinion, but upon a general and silent acquiescence of the courts in a popular demand. But, however adopted, it has become firmly embedded in English, as well as in American jurisprudence. So deeply did the inequities of the ancient system impress themselves upon the minds of the American colonists that the States, with one accord, made a denial of the right to question an accused person a part of their fundamental law, so that a maxim, which in England was a mere rule of evidence, became clothed in this country with the impregnability of a constitutional enactment.*"

Underlying rationale of the right against self-incrimination

102. As mentioned earlier "the right against self-incrimination" is now viewed as an essential safeguard in criminal procedure. Its underlying rationale broadly corresponds with two objectives—firstly, that of ensuring reliability of the statements made by an accused, and secondly, ensuring that such statements are made voluntarily. It is quite possible that a person suspected or accused of a crime may have been compelled to testify through methods involving coercion, threats or inducements during the investigative stage. When a person is compelled to testify on his/her own behalf, there is a higher likelihood of such testimony being false. False testimony is undesirable since it impedes the integrity of the trial and the subsequent verdict. Therefore, the purpose of the "rule against involuntary confessions" is to ensure that the testimony considered during trial is reliable. The premise is that involuntary statements are more likely to mislead the Judge and the prosecutor, thereby resulting in a miscarriage of justice. Even during the investigative stage, false statements are likely to cause delays and obstructions in the investigation efforts.

103. The concerns about the "voluntariness" of statements allow a more comprehensive account of this right. If involuntary statements were readily given weightage during trial, the investigators would have a strong incentive to compel such statements—often through methods involving coercion, threats, inducement or deception. Even if such involuntary statements are proved to be true, the law should not incentivise the use of interrogation tactics that violate the dignity and bodily integrity of the person being examined. In this sense, "the right against self-incrimination" is a vital safeguard against torture and other "third-degree methods" that could be used to elicit information. It serves as a check on police behaviour during the course of investigation. The exclusion of compelled testimony is important otherwise the investigators will be more inclined to extract information through such compulsion as a matter of course. The frequent reliance on such "short cuts" will compromise the diligence required for conducting meaningful investigations. During the trial stage, the onus is on the prosecution to prove the charges levelled against the defendant and the "right against self-incrimination" is a vital protection to ensure that the prosecution discharges the said onus.

* Ed.: As observed in *Brown v. Walker*, 40 L Ed 819 at p. 821 : 161 US 591 (1895)

104. These concerns have been recognised in Indian as well as foreign judicial precedents. For instance, Das Gupta, J. had observed in *State of Bombay v. Kathi Kalu Oghad*⁴⁸, SCR at pp. 43-44: (AIR p. 1819, para 30)

a “30. ... for long it has been generally agreed among those who have devoted serious thought to these problems that few things could be more harmful to the detection of crime or conviction of the real culprit, few things more likely to hamper the disclosure of truth than to allow investigators or prosecutors to slide down the easy path of producing by compulsion, evidence, whether oral or documentary, from an accused person. It has been felt that the existence of such an easy way would tend to dissuade persons in charge of investigation or prosecution from conducting diligent search for reliable independent evidence and from sifting of available materials with the care necessary for ascertainment of truth. If it is permissible in law to obtain evidence from the accused person by compulsion, why tread the hard path of laborious investigation and prolonged examination of other men, materials and documents? It has been well said that an abolition of this privilege would be an incentive for those in charge of enforcement of law ‘to sit comfortably in the shade rubbing red pepper into a poor devil’s eyes rather than to go about in the sun hunting up evidence’. (Sir James Fitzjames Stephen, *History of Criminal Law*, p. 442.) No less serious is the danger that some accused persons at least, may be induced to furnish evidence against themselves which is totally false—out of sheer despair and an anxiety to avoid an unpleasant present. Of all these dangers the Constitution-makers were clearly well aware and it was to avoid them that Article 20(3) was put in the Constitution.”

e 105. The rationale behind the Fifth Amendment in the US Constitution was eloquently explained by Goldberg, J. in *Murphy v. Waterfront Commission of New York Harbor*⁴⁹, US at p. 55: (L Ed pp. 681-82)

f “... It reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates ‘a fair State-individual balance by requiring the Government to leave the individual alone until good cause is shown for disturbing him and by requiring the Government in its contest with the individual to shoulder the entire load’; our respect for the inviolability of the human personality and of the right of each individual ‘to a private enclave where he may lead a private life’; our distrust of self-deprecatory statements; and our realisation that the privilege, while sometimes ‘a shelter to the guilty’, is often ‘a protection to the innocent’.”

h 48 AIR 1961 SC 1808 : (1961) 2 Cr LJ 856 : (1962) 3 SCR 10
49 12 L. Ed 2d 678 : 378 US 52 (1963)

106. A similar view was articulated by Lord Hailsham of St Marylebone in *Wong Kam-ming v. R.*⁵⁰, All ER at p. 946: (AC p. 261 B-C)

“... any civilised system of criminal jurisprudence must accord to the judiciary some means of excluding confessions or admissions obtained by improper methods. This is not only because of the potential unreliability of such statements, but also, and perhaps mainly, because in a civilised society it is vital that persons in custody or charged with offences should not be subjected to ill treatment or improper pressure in order to extract confessions. It is therefore of very great importance that the courts should continue to insist that before extra-judicial statements can be admitted in evidence the prosecution must be made to prove beyond reasonable doubt that the statement was not obtained in a manner which should be reprobated and was therefore in the truest sense voluntary.”

107. V.R. Krishna Iyer, J. echoed similar concerns in *Nandini Satpathy case*⁴⁵: (SCC p. 442, para 34)

“34. ... And Article 20(3) is a human article, a guarantee of dignity and integrity and of inviolability of the person and refusal to convert an adversary system into an inquisitorial scheme in the antagonistic ante-chamber of a police station. And in the long run, that investigation is best which uses stratagems least, that policeman deserves respect who gives his fists rest and his wits restlessness. The police are part of us and must rise in people's esteem through firm and friendly, not foul and sneaky strategy.”

108. In spite of the constitutionally entrenched status of the right against self-incrimination, there have been some criticisms of the policy underlying the same. John Wigmore (1960) argued against a broad view of the privilege which extended the same to the investigative stage. [Refer John Wigmore, “The Privilege against Self-Incrimination, Its Constitutional Affection, Raison d'être and Miscellaneous Implications”⁵¹.] He has asserted that the doctrinal origins of the “rule against involuntary confessions” in evidence law and those of the “right to self-incrimination” were entirely different and catered to different objectives. In the learned author's opinion, the “rule against involuntary confessions” evolved on account of the distrust of statements made in custody. The objective was to prevent these involuntary statements from being considered as evidence during trial but there was no prohibition against relying on statements made involuntarily during investigation. Wigmore argued that the privilege against self-incrimination should be viewed as a right that was confined to the trial stage, since the Judge can intervene to prevent an accused from revealing incriminating information at that stage, while similar oversight is not always possible during the pre-trial stage.

50 1980 AC 247 : (1979) 2 WLR 81 : (1979) 1 All ER 939 (PC)

45 *Nandini Satpathy v. P.L. Dani*, (1978) 2 SCC 424 : 1978 SCC (Cri) 236

51 51 Journal of Criminal Law, Criminology and Police Science 138 (1960)

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a 109. In recent years, scholars such as David Dolinko (1986), Akhil Reed Amar (1997) and Mike Redmayne (2007) among others have encapsulated the objections to the scope of this right. [See David Dolinko, "Is There a Rationale for the Privilege against Self-Incrimination?"⁵²; Akhil Reed Amar, *The Constitution and Criminal Procedure: First Principles* (New Haven: Yale University Press, 1997) at pp. 65-70; Mike Redmayne, "Re-thinking the Privilege against Self-Incrimination"⁵³.]

b 110. It is argued that in aiming to create a fair State-individual balance in criminal cases, the task of the investigators and prosecutors is made unduly difficult by allowing the accused to remain silent. If the overall intent of the criminal justice system is to ensure public safety through expediency in investigations and prosecutions, it is urged that the privilege against self-incrimination protects the guilty at the cost of such utilitarian objectives. Another criticism is that adopting a broad view of this right does not deter
c improper practices during investigation and it instead encourages investigators to make false representations to courts about the voluntary or involuntary nature of custodial statements. It is reasoned that when investigators are under pressure to deliver results there is an inadvertent tendency to rely on methods involving coercion, threats, inducement or deception in spite of the legal prohibitions against them. Questions have also
d been raised about conceptual inconsistencies in the way that courts have expanded the scope of this right. One such objection is that if the legal system is obliged to respect the mental privacy of individuals, then why is there no prohibition against compelled testimony in civil cases which could expose parties to adverse consequences. Furthermore, questions have also
e been asked about the scope of the privilege being restricted to testimonial acts while excluding physical evidence which can be extracted through compulsion.

f 111. In response to John Wigmore's thesis about the separate foundations of the "rule against involuntary confessions", we must recognise the infusion of constitutional values into all branches of law, including procedural areas such as the law of evidence. While the abovementioned criticisms have been made in academic commentaries, we must defer to the judicial precedents that control the scope of Article 20(3). For instance, the interrelationship between the privilege against self-incrimination and the requirements of observing due process of law were emphasised by William Douglas, J. in *Rochin v. California*⁵⁴, US at p. 178: (L Ed p. 193)

g "As an original matter it might be debatable whether the provision in the Fifth Amendment that no person 'shall be compelled in any criminal case to be a witness against himself' serves the ends of justice. Not all civilised legal procedures recognise it. But the choice was made by the framers, a choice which sets a standard for legal trials in this country.

h 52 33 University of California Los Angeles Law Review 1063-1148 (1986)

53 27 Oxford Journal of Legal Studies 209-232 (Summer 2007)

54 96 L Ed 183 : 342 US 165 (1951)

The framers made it a standard of due process for prosecutions by the Federal Government. If it is a requirement of due process for a trial in the federal courthouse, it is impossible for me to say it is not a requirement of due process for a trial in the State courthouse." a

I-A. Whether the investigative use of the impugned techniques creates a likelihood of incrimination for the subject?

112. The respondents have submitted that the compulsory administration of the impugned tests will only be sought to boost investigation efforts and that the test results by themselves will not be admissible as evidence. The next prong of this position is that if the test results enable the investigators to discover independent materials that are relevant to the case, such subsequently discovered materials should be admissible during trial. In order to evaluate this position, we must answer the following questions: b

- Firstly, we should clarify the scope of the "right against self-incrimination" i.e. whether it should be construed as a broad protection that extends to the investigation stage or should it be viewed as a narrower right confined to the trial stage? c
- Secondly, we must examine the ambit of the words "accused of any offence" in Article 20(3) i.e. whether the protection is available only to persons who are formally accused in criminal cases, or does it extend to include suspects and witnesses as well as those who apprehend incrimination in cases other than the one being investigated? d
- Thirdly, we must evaluate the evidentiary value of independent materials that are subsequently discovered with the help of the test results. In light of the "theory of confirmation by subsequent facts" incorporated in Section 27 of the Evidence Act, 1872 we need to examine the compatibility between this section and Article 20(3). Of special concern are situations when persons could be compelled to reveal information which leads to the discovery of independent materials. To answer this question, we must clarify what constitutes "incrimination" for the purpose of invoking Article 20(3). e

Applicability of Article 20(3) to the stage of investigation

113. The question of whether Article 20(3) should be narrowly construed as a trial right or a broad protection that extends to the stage of investigation has been conclusively answered by our courts. In *M.P. Sharma v. Satish Chandra*⁵⁵, it was held by Jagannadhadas, J. at SCR pp. 1087-88: (AIR p. 304, para 10) g

"10. Broadly stated the guarantee in Article 20(3) is against 'testimonial compulsion'. It is suggested that this is confined to the oral evidence of a person standing his trial for an offence when called to the witness stand. We can see no reason to confine the content of the h

55 AIR 1954 SC 300 : 1954 Cri LJ 865 : 1954 SCR 1077

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a constitutional guarantee to this barely literal import. So to limit it would be to rob the guarantee of its substantial purpose and to miss the substance for the sound as stated in certain American decisions. ...
b Indeed, every positive volitional act which furnishes evidence is testimony, and testimonial compulsion connotes coercion which procures the positive volitional evidentiary acts of the person, as opposed to the negative attitude of silence or submission on his part. Nor is there any reason to think that the protection in respect of the evidence so procured is confined to what transpires at the trial in the courtroom.

c The phrase used in Article 20(3) is 'to be a witness' and not to 'appear as a witness': It follows that the protection afforded to an accused insofar as it is related to the phrase 'to be a witness' is not merely in respect of testimonial compulsion in the courtroom but may well extend to compelled testimony previously obtained from him. It is available therefore to a person against whom a formal accusation relating to the commission of an offence has been levelled which in the normal course may result in prosecution. Whether it is available to other persons in other situations does not call for decision in this case."

d 114. These observations were cited with approval by B.P. Sinha, C.J. in *State of Bombay v. Kathi Kalu Oghad*⁴⁸, SCR at pp. 26-28. In the minority opinion, Das Gupta, J. affirmed the same position, *ibid.* at SCR p. 40: (AIR p. 1818, para 22)

e "22. ... If the protection was intended to be confined to being a witness in court then really it would have been an idle protection. It would be completely defeated by compelling a person to give all the evidence outside court and then, having what he was so compelled to do, proved in court through other witnesses. An interpretation which so completely defeats the constitutional guarantee cannot, of course, be correct. The contention that the protection afforded by Article 20(3) is limited to the stage of trial must therefore be rejected."

f 115. The broader view of Article 20(3) was consolidated in *Nandini Satpathy v. P.L. Dani*⁴⁵:

g "21. ... Any giving of evidence, any furnishing of information, if likely to have an incriminating impact, answers the description of being witness against oneself. Not being limited to the forensic stage by express words in Article 20(3), we have to construe the expression to apply to every stage where furnishing of information and collection of materials takes place. That is to say, even the investigation at the police level is embraced by Article 20(3). This is precisely what Section 161(2) means. That sub-section relates to oral examination by police officers and grants immunity at that stage. Briefly, the Constitution and the Code are coterminous in the protective area. While the Code may be changed, the Constitution is more enduring. Therefore, we have to base our conclusion

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48 AIR 1961 SC 1808 : (1961) 2 Cr LJ 856 : (1962) 3 SCR 10
45 (1978) 2 SCC 424 : 1978 SCC (Cri) 236

not merely upon Section 161(2) but on the more fundamental protection, although equal in ambit, contained in Article 20(3).

(SCC p. 435, para 21) a

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44. ... If the police can interrogate to the point of self-accusation, the subsequent exclusion of that evidence at the trial hardly helps because the harm has been already done. The police will prove through other evidence what they have procured through forced confession. So it is that the foresight of the framers has pre-empted self-incrimination at the incipient stages by not expressly restricting it to the trial stage in court. True, compelled testimony previously obtained is excluded. But the preventive blow falls also on pre-court testimonial compulsion. The condition, as the decisions now go, is that the person compelled must be an accused. Both precedent procurement and subsequent exhibition of self-incriminating testimony are obviated by intelligent constitutional anticipation." (SCC p. 449, para 44) b c

116. In upholding this broad view of Article 20(3), V.R. Krishna Iyer, J. relied heavily on the decision of the US Supreme Court in *Miranda v. Arizona*⁴⁷. The majority opinion (by Earl Warren, C.J.) laid down that custodial statements could not be used as evidence unless the police officers had administered warnings about the accused's right to remain silent. The decision also recognised the right to consult a lawyer prior to and during the course of custodial interrogations. The practice promoted by this case is that it is only after a person has "knowingly and intelligently" waived of these rights after receiving a warning that the statements made thereafter can be admitted as evidence. The safeguards were prescribed in the following manner *ibid.* at US pp. 444-45: (L Ed pp. 706-07) d e

"... the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney h

47 16 L Ed 2d 694 : 384 US 436 (1965)

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a before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned."

b 117. These safeguards were designed to mitigate the disadvantages faced by a suspect in a custodial environment. This was done in recognition of the fact that methods involving deception and psychological pressure were routinely used and often encouraged in police interrogations. Emphasis was placed on the ability of the person being questioned to fully comprehend and understand the content of the stipulated warning. It was held *ibid.* at US pp. 457-58: (*Miranda case*⁴⁷, L Ed pp. 713-14)

c "In these cases, we might not find the defendant's statements to have been involuntary in traditional terms. Our concern for adequate safeguards to protect the precious Fifth Amendment right is, of course, not lessened in the slightest. In each of the cases, the defendant was thrust into an unfamiliar atmosphere and run through menacing police interrogation procedures. ... It is obvious that such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner. This atmosphere carries its own badge of intimidation. To be sure, this is not physical intimidation, but it is equally destructive of human dignity. (Professor Sutherland, *Crime and Confession*⁵⁶.) The current practice of incommunicado interrogation is at odds with one of our Nation's most cherished principles—that the individual may not be compelled to incriminate himself. Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice."

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f 118. The opinion also explained the significance of having a counsel present during a custodial interrogation. It was noted, *ibid.* at US pp. 469-70: (*Miranda case*⁴⁷, L Ed p. 721)

g "The circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators. Therefore, the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today. Our aim is to assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process. A once-stated warning, delivered by those who will conduct the interrogation, cannot itself suffice to that end among those who most require knowledge of their rights. A mere warning given by the interrogators is not alone sufficient to accomplish that end. Prosecutors themselves claim that the

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⁴⁷ *Miranda v. Arizona*, 16 L Ed 2d 694 : 384 US 436 (1965)
⁵⁶ 79 Harvard Law Review 21, 37 (1965)

admonishment of the right to remain silent without more 'will benefit only the recidivist and the professional'. (Brief for the *National District Attorneys Association* as amicus curiae, p. 14.) Even preliminary advice given to the accused by his own attorney can be swiftly overcome by the secret interrogation process. (Cited from *Escobedo v. Illinois*⁵⁷, US at p. 485....) Thus, the need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning if the defendant so desires." a

119. The majority decision in *Miranda*⁴⁷ was not a sudden development in the US constitutional law. The scope of the privilege against self-incrimination had been progressively expanded in several prior decisions. The notable feature was the recognition of the interrelationship between the Fifth Amendment and the Fourteenth Amendment's guarantee that the Government must observe the "due process of law" as well as the Fourth Amendment's protection against "unreasonable search and seizure". While it is not necessary for us to survey these decisions, it will suffice to say that after *Miranda*⁴⁷ administering a warning about a person's right to silence during custodial interrogations as well as obtaining a voluntary waiver of the prescribed rights has become a ubiquitous feature in the US criminal justice system. In the absence of such a warning and voluntary waiver, there is a presumption of compulsion with regard to the custodial statements thereby rendering them inadmissible as evidence. The position in India is different since there is no automatic presumption of compulsion in respect of custodial statements. However, if the fact of compulsion is proved then the resulting statements are rendered inadmissible as evidence. b

Who can invoke the protection of Article 20(3)?

120. The decision in *Nandini Satpathy case*⁴⁵ also touched on the question of who is an "accused" for the purpose of invoking Article 20(3). This question had been left open in *M.P. Sharma case*⁵⁵. Subsequently, it was addressed in *Kathi Kalu Oghad*⁴⁸ at SCR p. 37; (AIR p. 1817, para 16) c

"16. (7) To bring the statement in question within the prohibition of Article 20(3), the person accused must have stood in the character of an accused person at the time he made the statement. It is not enough that he should become an accused, any time after the statement has been made." d

121. While there is a requirement of formal accusation for a person to invoke Article 20(3) it must be noted that the protection contemplated by Section 161(2) CrPC is wider. Section 161(2) read with 161(1) protects "any person supposed to be acquainted with the facts and circumstances of the e

⁵⁷ 12 L Ed 2d 977 : 378 US 478 (1963)

⁴⁷ *Miranda v. Arizona*, 16 L Ed 2d 694 : 384 US 436 (1965)

⁴⁵ *Nandini Satpathy v. P.L. Dani*, (1978) 2 SCC 424 : 1978 SCC (Cri) 236 f

⁵⁵ *M.P. Sharma v. Satish Chandra*, AIR 1954 SC 300 : 1954 Cri LJ 865 : 1954 SCR 1077

⁴⁸ *State of Bombay v. Kathi Kalu Oghad*, AIR 1961 SC 1808 : (1961) 2 Cri LJ 856 : (1962) 3 SCR 10 g

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case” in the course of examination by the police. The language of this provision is as follows:

a “161. *Examination of witnesses by police.*—(1) Any police officer making an investigation under this Chapter, or any police officer not below such rank as the State Government may, by general or special order, prescribe in this behalf, acting on the requisition of such officer, may examine orally any person supposed to be acquainted with the facts and circumstances of the case.

b (2) Such person shall be bound to answer truly all questions relating to such case put to him by such officer, other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture.

c (3) The police officer may reduce into writing any statement made to him in the course of an examination under this section; and if he does so, he shall make a separate and true record of the statement of each such person whose statement he records.”

d 122. Therefore the “right against self-incrimination” protects persons who have been formally accused as well as those who are examined as suspects in criminal cases. It also extends to cover witnesses who apprehend that their answers could expose them to criminal charges in the ongoing investigation or even in cases other than the one being investigated. Krishna Iyer, J. clarified this position: (*Nandini Satpathy case*⁴⁵, SCC p. 435, para 21)

e “21. ... The learned Advocate General, influenced by American decisions rightly agreed that in expression Section 161(2) of the Code might cover not merely accusations already registered in police stations but those which are likely to be the basis for exposing a person to a criminal charge. Indeed, this wider construction, if applicable to Article 20(3), approximates the constitutional clause to the explicit statement of the prohibition in Section 161(2). This latter provision meaningfully uses the expression ‘expose himself to a criminal charge’. Obviously, these words mean, not only cases where the person is already exposed to a criminal charge but also instances which will imminently expose him to criminal charges.”

f It was further observed: (SCC pp. 451-52, para 50)

g “50. ... ‘To be witness against oneself’ is not confined to particular offence regarding which the questioning is made but extends to other offences about which the accused has reasonable apprehension of implication from his answer. This conclusion also flows from ‘tendency to be exposed to a criminal charge’. A ‘criminal charge’ covers any criminal charge then under investigation or trial or which imminently threatens the accused.” (emphasis in original)

h 123. Even though Section 161(2) CrPC casts a wide protective net to protect the formally accused persons as well as suspects and witnesses during the investigative stage, Section 132 of the Evidence Act limits the

⁴⁵ *Nandini Satpathy v. P.L. Dani*, (1978) 2 SCC 424 : 1978 SCC (Cri) 236

applicability of this protection to witnesses during the trial stage. The latter provision provides that witnesses cannot refuse to answer questions during a trial on the ground that the answers could incriminate them. However, the proviso to this section stipulates that the content of such answers cannot expose the witness to arrest or prosecution, except for a prosecution for giving false evidence. Therefore, the protection accorded to witnesses at the stage of trial is not as wide as the one accorded to the accused, suspects and witnesses during investigation [under Section 161(2) CrPC]. Furthermore, it is narrower than the protection given to the accused during the trial stage [under Section 313(3) and proviso (b) to Section 315(1) CrPC]. The legislative intent is to preserve the fact-finding function of a criminal trial.

124. Section 132 of the Evidence Act reads:

“132. *Witness not excused from answering on ground that answer will criminate.*—A witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any suit or in any civil or criminal proceeding, upon the ground that the answer to such question will criminate, or may tend directly or indirectly to criminate, such witness, or that it will expose, or tend directly or indirectly to expose, such witness to a penalty or forfeiture of any kind:

Proviso.—Provided that no such answer, which a witness shall be compelled to give, shall subject him to any arrest or prosecution, or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by such answer.”

125. Since the extension of the “right against self-incrimination” to suspects and witnesses has its basis in Section 161(2) CrPC it is not readily available to persons who are examined during proceedings that are not governed by the Code. There is a distinction between proceedings of a purely criminal nature and those proceedings which can culminate in punitive remedies and yet cannot be characterised as criminal proceedings. The consistent position has been that ordinarily Article 20(3) cannot be invoked by witnesses during proceedings that cannot be characterised as criminal proceedings. In administrative and quasi-criminal proceedings, the protection of Article 20(3) becomes available only after a person has been formally accused of committing an offence. For instance in *Raja Narayanlal Bansilal v. Maneck Phiroz Mistry*⁵⁸, the contention related to the admissibility of a statement made before an Inspector who was appointed under the Companies Act, 1923 to investigate the affairs of a company and report thereon. It had to be decided whether the persons who were examined by the Inspector concerned could claim the protection of Article 20(3). The question was answered, *ibid.* at SCR p. 440: (AIR p. 39, para 24)

“24. ... The scheme of the relevant sections is that the investigation begins broadly with a view to examine the management of the affairs of the company to find out whether any irregularities have been committed or not. In such a case there is no accusation, either formal or otherwise,

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a against any specified individual; there may be a general allegation that the affairs are irregularly, improperly or illegally managed; but who would be responsible for the affairs which are reported to be irregularly managed is a matter which would be determined at the end of the enquiry. At the commencement of the enquiry and indeed throughout its proceedings there is no accused person, no accuser and no accusation against anyone that he has committed an offence. In our opinion a general enquiry and investigation into the affairs of the company thus contemplated cannot be regarded as an investigation which starts with an accusation contemplated in Article 20(3) of the Constitution.”

b 126. A similar issue arose for consideration in *Ramesh Chandra Mehta v. State of W.B.*⁵⁹, wherein it was held at SCR p. 472: (AIR pp. 946-47, para 14)

c “14. ... Normally a person stands in the character of an accused when a first information report is lodged against him in respect of an offence before an officer competent to investigate it, or when a complaint is made relating to the commission of an offence before a Magistrate competent to try or send to another Magistrate for trial of the offence. Where a Customs Officer arrests a person and informs that person of the grounds of his arrest, [which he is bound to do under Article 22(1) of the Constitution] for the purposes of holding an inquiry into the infringement of the provisions of the Sea Customs Act which he has reason to believe has taken place, there is no formal accusation of an offence. In the case of an offence by infringement of the Sea Customs Act which is punishable at the trial before a Magistrate there is an accusation when a complaint is lodged by an officer competent in that behalf before the Magistrate.”

d e 127. In *Balkishan A. Devidayal v. State of Maharashtra*⁶⁰, one of the contentious issues was whether the statements recorded by a Railway Police Force (RPF) officer during an inquiry under the Railway Property (Unlawful Possession) Act, 1966 would attract the protection of Article 20(3). Sarkaria, J. held that such an inquiry was substantially different from an investigation contemplated under CrPC, and therefore formal accusation was a necessary condition for a person to claim the protection of Article 20(3). It was observed: (SCC p. 623, para 70)

f g “70. To sum up, only a person against whom a formal accusation of the commission of an offence has been made can be a person ‘accused of an offence’ within the meaning of Article 20(3). Such formal accusation may be specifically made against him in an FIR or a formal complaint or any other formal document or notice served on that person, which ordinarily results in his prosecution in court. In the instant case no such formal accusation had been made against the appellant when his statement(s) in question were recorded by the RPF officer.”

h ⁵⁹ AIR 1970 SC 940 : 1970 Cri LJ 863 : (1969) 2 SCR 461

⁶⁰ (1980) 4 SCC 600 : 1981 SCC (Cri) 62

What constitutes "incrimination" for the purpose of Article 20(3)?

128. We can now examine the various circumstances that could "expose a person to criminal charges". The scenario under consideration is one where a person in custody is compelled to reveal information which aids the investigation efforts. The information so revealed can prove to be incriminatory in the following ways:

- The statements made in custody could be directly relied upon by the prosecution to strengthen their case. However, if it is shown that such statements were made under circumstances of compulsion, they will be excluded from the evidence.
- Another possibility is that of "derivative use" i.e. when information revealed during questioning leads to the discovery of independent materials, thereby furnishing a link in the chain of evidence gathered by the investigators.
- Yet another possibility is that of "transactional use" i.e. when the information revealed can prove to be helpful for the investigation and prosecution in cases other than the one being investigated.
- A common practice is that of extracting materials or information, which are then compared with materials that are already in the possession of the investigators. For instance, handwriting samples and specimen signatures are routinely obtained for the purpose of identification or corroboration.

129. The decision in *Nandini Satpathy case*⁴⁵ sheds light on what constitutes incrimination for the purpose of Article 20(3). Krishna Iyer, J. observed: (SCC pp. 449-50, para 46)

"46. ... In this sense, answers that would, in themselves, support a conviction are confessions but answers which have a reasonable tendency strongly to point out to the guilt of the accused are incriminatory. Relevant replies which furnish a real and clear link in the chain of evidence indeed to bind down the accused with the crime become incriminatory and offend Article 20(3) if elicited by pressure from the mouth of the accused. ... An answer acquires confessional status only if, in terms or substantially, all the facts which constitute the offence are admitted by the offender. If his statement also contains self-exculpatory matter it ceases to be a confession. Article 20(3) strikes at confessions and self-incriminations but leaves untouched other relevant facts."

130. Reliance was also placed on the decision of the US Supreme Court in *Hoffman v. United States*⁶¹. The controversy therein was whether the privilege against self-incrimination was available to a person who was called on to testify as a witness in a Grand Jury investigation. Clark, J. answered the question in the affirmative at US pp. 486-87: (L Ed p. 1124)

"The privilege afforded not only extends to answers that would in themselves support a conviction under a federal criminal statute but

⁴⁵ *Nandini Satpathy v. P.L. Dani*, (1978) 2 SCC 424 : 1978 SCC (Cr) 236

⁶¹ 95 L Ed 1118 : 341 US 479 (1950)

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a likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime. ... But this protection must be confined to instances where the witness has reasonable cause to apprehend danger from a direct answer. ... To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure [may] result."

b (internal citations omitted)

131. However, Krishna Iyer, J. also cautioned against including in the prohibition even those answers which might be used as a step towards obtaining evidence against the accused. It was stated: (*Nandini Satpathy case*⁴⁵, SCC p. 451, para 48)

c "48. ... The policy behind the privilege, under our scheme, does not swing so wide as to sweep out of admissibility statements neither confessional per se nor guilty in tendency but merely relevant facts which, viewed in any setting, does not have a sinister import. To spread the net so wide is to make a mockery of the examination of the suspect, so necessitous in the search for truth. Overbreadth undermines, and we demur to such morbid exaggeration of a wholesome protection. ... In d *Kathi Kalu Oghad case*⁴⁸, this Court authoritatively observed, on the bounds between constitutional proscription and testimonial permission: (AIR p. 1815, para 12)

e '12. In order that a testimony by an accused person may be said to have been self-incriminatory, the compulsion of which comes within the prohibition of the constitutional provision, it must be of such a character that by itself it should have the tendency of incriminating the accused, if not also of actually doing so. In other words, it should be a statement which makes the case against the accused at least probable, considered by itself.'

f Again the court indicated that Article 20(3) could be invoked only against statements which 'had a *material bearing on the criminality* of the maker of the statement'. 'By itself' does not exclude the setting or other integral circumstances but means something in the fact disclosed a guilt element. Blood on clothes, gold bars with notorious marks and presence on the scene or possession of the lethal weapon or corrupt currency have a tale to tell, beyond red fluid, precious metal, gazing at the stars or testing sharpness or value of the rupee. The setting of the case is an implied component of the statement." (emphasis in original)

g 132. In the light of these observations, we must examine the permissibility of extracting statements which may furnish a link in the chain

h ⁴⁵ *Nandini Satpathy v. P.L. Dani*, (1978) 2 SCC 424 : 1978 SCC (Cr) 236

⁴⁸ *State of Bombay v. Kathi Kalu Oghad*, AIR 1961 SC 1808 : (1961) 2 Cr LJ 856 : (1962) 3 SCR 10

of evidence and hence create a risk of exposure to criminal charges. The crucial question is whether such derivative use of information extracted in a custodial environment is compatible with Article 20(3). It is a settled principle that statements made in custody are considered to be unreliable unless they have been subjected to cross-examination or judicial scrutiny. The scheme created by the Code of Criminal Procedure and the Evidence Act also mandates that confessions made before police officers are ordinarily not admissible as evidence and it is only the statements made in the presence of a Judicial Magistrate which can be given weightage. The doctrine of "excluding the fruit of a poisonous tree" has been incorporated in Sections 24, 25 and 26 of the Evidence Act, 1872 which read as follows:

"24. *Confession caused by inducement, threat or promise, when irrelevant in criminal proceeding.*—A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the court to have been caused by any inducement, threat or promise, having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the court, to give the accused person grounds, which would appear to him reasonable, for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.

25. *Confession to police officer not proved.*—No confession made to a police officer, shall be proved as against a person accused of any offence.

26. *Confession by accused while in custody of police not to be proved against him.*—No confession made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person."

133. We have already referred to the language of Section 161 CrPC which protects the accused as well as suspects and witnesses who are examined during the course of investigation in a criminal case. It would also be useful to refer to Sections 162, 163 and 164 CrPC which lay down procedural safeguards in respect of statements made by persons during the course of investigation. However, Section 27 of the Evidence Act incorporates the "theory of confirmation by subsequent facts" i.e. statements made in custody are admissible to the extent that they can be proved by the subsequent discovery of facts. It is quite possible that the content of the custodial statements could directly lead to the subsequent discovery of relevant facts rather than their discovery through independent means. Hence such statements could also be described as those which "furnish a link in the chain of evidence" needed for a successful prosecution. This provision reads as follows:

"27. *How much of information received from accused may be proved.*— Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved."

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a 134. This provision permits the derivative use of custodial statements in the ordinary course of events. In Indian law, there is no automatic presumption that the custodial statements have been extracted through compulsion. In short, there is no requirement of additional diligence akin to the administration of *Miranda*⁴⁷ warnings. However, in circumstances where it is shown that a person was indeed compelled to make statements while in custody, relying on such testimony as well as its derivative use will offend Article 20(3).

b 135. The relationship between Section 27 of the Evidence Act and Article 20(3) of the Constitution was clarified in *Kathi Kalu Oghad*⁴⁸. It was observed in the majority opinion by Jagannadhadas, J., at SCR pp. 33-34: (AIR pp. 1815-16, para 13)

c, "13. ... The information given by an accused person to a police officer leading to the discovery of a fact which may or may not prove incriminatory has been made admissible in evidence by that section. If it is not incriminatory of the person giving the information, the question does not arise. It can arise only when it is of an incriminatory character so far as the giver of the information is concerned. If the self-incriminatory information has been given by an accused person without any threat, that will be admissible in evidence and that will not be hit by the provisions of clause (3) of Article 20 of the Constitution for the reason that there has been no compulsion. *It must, therefore, be held that the provisions of Section 27 of the Evidence Act are not within the prohibition aforesaid, unless compulsion [has] been used in obtaining the information.*" (emphasis supplied)

d This position was made amply clear at SCR pp. 35-36: (AIR p. 1816, para 15)

e "15. ... Hence, the mere fact that the accused person, when he made the statement in question was in police custody would not, by itself, be the foundation for an inference of law that the accused was compelled to make the statement. Of course, it is open to an accused person to show that while he was in police custody at the relevant time, he was subjected to treatment which, in the circumstances of the case, would lend itself to the inference that compulsion was in fact exercised. In other words, it will be a question of fact in each case to be determined by the court on weighing the facts and circumstances disclosed in the evidence before it."

f 136. The minority opinion also agreed with the majority's conclusion on this point since Das Gupta, J., held at SCR p. 47: (*Kathi Kalu Oghad case*⁴⁸, AIR p. 1820, para 36)

g "36. ... Section 27 provides that when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of the information, whether it amounts to a confession or not, as relates

h 47 *Miranda v. Arizona*, 16 L Ed 2d 694 : 384 US 436 (1965)

48 *State of Bombay v. Kathi Kalu Oghad*, AIR 1961 SC 1808 : (1961) 2 Cri LJ 856 : (1962) 3 SCR 10

distinctly to the fact thereby discovered, may be proved. It cannot be disputed that by giving such information the accused furnishes evidence and therefore is a 'witness' during the investigation. Unless however he is 'compelled' to give the information he cannot be said to be 'compelled' to be a witness; and so Article 20(3) is not infringed. Compulsion is not however inherent in the receipt of information from an accused person in the custody of a police officer. There may be cases where an accused in custody is compelled to give the information later on sought to be proved under Section 27. There will be other cases where the accused gives the information without any compulsion. Where the accused is compelled to give information it will be an infringement of Article 20(3); but there is no such infringement where he gives the information without any compulsion."

137. We must also address another line of reasoning which was adopted in one of the impugned judgments. It was stated that the exclusionary rule in evidence law is applicable to statements that are inculpatory in nature. Based on this premise, it was observed that at the time of administering the impugned tests, it cannot be ascertained whether the resulting revelations or inferences will prove to be inculpatory or exculpatory in due course. Taking this reasoning forward, it was held that the compulsory administration of the impugned tests should be permissible since the same does not necessarily lead to the extraction of inculpatory evidence. We are unable to agree with this reasoning.

138. The distinction between inculpatory and exculpatory evidence gathered during investigation is relevant for deciding what will be admissible as evidence during the trial stage. The exclusionary rule in evidence law mandates that if inculpatory evidence has been gathered through improper methods (involving coercion, threat or inducement among others) then the same should be excluded from the trial, while there is no such prohibition on the consideration of exculpatory evidence. However, this distinction between the treatment of inculpatory and exculpatory evidence is made retrospectively at the trial stage and it cannot be extended back to the stage of investigation. If we were to permit the admission of involuntary statement on the ground that at the time of asking a question it is not known whether the answer will be inculpatory or exculpatory, the "right against self-incrimination" will be rendered meaningless. The law confers on "any person" who is examined during an investigation, an effective choice between speaking and remaining silent. This implies that it is for the person being examined to decide whether the answer to a particular question will eventually prove to be inculpatory or exculpatory. Furthermore, it is also likely that the information or materials collected at an earlier stage of investigation can prove to be inculpatory in due course.

139. However, it is conceivable that in some circumstances the testimony extracted through compulsion may not actually lead to exposure to criminal charges or penalties. For example this is a possibility when the investigators make an offer of immunity against the direct use, derivative use or

- transactional use of the testimony. Immunity against direct use entails that a witness will not be prosecuted on the basis of the statements made to the investigators. A protection against derivative use implies that a person will not be prosecuted on the basis of the fruits of such testimony. Immunity against transactional use will shield a witness from criminal charges in cases other than the one being investigated. It is of course entirely up to the investigating agencies to decide whether to offer immunity and in what form. Even though this is distinctly possible, it is difficult to conceive of such a situation in the context of the present case. A person who is given an offer of immunity against prosecution is far more likely to voluntarily cooperate with the investigation efforts. This could be in the form of giving testimony or helping in the discovery of material evidence. If a person is freely willing to cooperate with the investigation efforts, it would be redundant to compel such a person to undergo the impugned tests. If reliance on such tests is sought for refreshing a cooperating witness' memory, the person will in all probability give his/her consent to undergo these tests.

140. It could be argued that the compulsory administration of the impugned tests can prove to be useful in instances where the cooperating witness has difficulty in remembering the relevant facts or is wilfully concealing crucial details. Such situations could very well arise when a person who is a co-accused is offered immunity from prosecution in return for cooperating with the investigators. Even though the right against self-incrimination is not directly applicable in such situations, the relevant legal inquiry is whether the compulsory administration of the impugned tests meets the requisite standard of "substantive due process" for placing restraints on personal liberty.

141. At this juncture, it must be reiterated that Indian law incorporates the "rule against adverse inferences from silence" which is operative at the trial stage. As mentioned earlier, this position is embodied in a conjunctive reading of Article 20(3) of the Constitution and Sections 161(2), 313(3) and proviso (b) of Section 315(1) CrPC. The gist of this position is that even though an accused is a competent witness in his/her own trial, he/she cannot be compelled to answer questions that could expose him/her to incrimination and the trial Judge cannot draw adverse inferences from the refusal to do so. This position is cemented by prohibiting any of the parties from commenting on the failure of the accused to give evidence. This rule was lucidly explained in the English case of *Woolmington v. Director of Public Prosecutions*⁶², AC at p. 481:

"The 'right to silence' is a principle of common law and it means that normally courts or tribunals of fact should not be invited or encouraged to conclude, by parties or prosecutors, that a suspect or an accused is guilty merely because he has refused to respond to questions put to him by the police or by the Court."

⁶² 1935 AC 462 : 1935 All ER Rep 1 (HL)

142. The 180th Report of the Law Commission of India (May 2002) dealt with this very issue. It considered arguments for diluting the “rule against adverse inferences from silence”. Apart from surveying several foreign statutes and decisions, the Report took note of the fact that Section 342(2) of the erstwhile Code of Criminal Procedure, 1898 permitted the trial Judge to draw an inference from the silence of the accused. However, this position was changed with the enactment of the new Code of Criminal Procedure in 1973, thereby prohibiting the making of comments as well as the drawing of inferences from the fact of an accused’s silence. In light of this, the Report concluded:

“180. ... We have reviewed the law in other countries as well as in India for the purpose of examining whether any amendments are necessary in the Code of Criminal Procedure, 1973. On a review, we find that no changes in the law relating to silence of the accused are necessary and if made, they will be ultra vires of Article 20(3) and Article 21 of the Constitution of India. We recommend accordingly.”

143. Some commentators have argued that the “rule against adverse inferences from silence” should be broadly construed in order to give protection against non-penal consequences. It is reasoned that the fact of a person’s refusal to answer questions should not be held against him/her in a wide variety of settings, including those outside the context of criminal trials. A hypothetical illustration of such a setting is a deportation hearing where an illegal immigrant could be deported following a refusal to answer questions or furnish materials required by the authorities concerned. This question is relevant for the present case because a person who refuses to undergo the impugned tests during the investigative stage could face non-penal consequences which lie outside the protective scope of Article 20(3). For example, a person who refuses to undergo these tests could face the risk of custodial violence, increased police surveillance or harassment thereafter. Even a person who is compelled to undergo these tests could face such adverse consequences on account of the contents of the test results if they heighten the investigators’ suspicions. Each of these consequences, though condemnable, fall short of the requisite standard of “exposure to criminal charges and penalties” that has been enumerated in Section 161(2) CrPC. Even though Article 20(3) will not be applicable in such circumstances, reliance can be placed on Article 21 if such non-penal consequences amount to a violation of “personal liberty” as contemplated under the Constitution.

144. In the past, this Court has recognised the rights of prisoners (undertrials as well as convicts) as well as individuals in other custodial environments to receive “fair, just and equitable” treatment. For instance in *Sunil Batra v. Delhi Admn.*⁶³, it was decided that practices such as “solitary confinement” and the use of bar-fetters in jails were violative of Article 21. Hence, in circumstances where persons who refuse to answer questions during the investigative stage are exposed to adverse consequences of a non-penal nature, the inquiry should account for the expansive scope of Article 21 rather than the right contemplated by Article 20(3).

63 (1978) 4 SCC 494 : 1979 SCC (Cri) 155

I-B. Whether the results derived from the impugned techniques amount to “testimonial compulsion” thereby attracting the bar of Article 20(3)?

- a 145. The next issue is whether the results gathered from the impugned tests amount to “testimonial compulsion” thereby attracting the prohibition of Article 20(3). For this purpose, it is necessary to survey the precedents which deal with what constitutes “testimonial compulsion” and how testimonial acts are distinguished from the collection of physical evidence. Apart from the apparent distinction between evidence of a testimonial and physical nature,
 - b some forms of testimonial acts lie outside the scope of Article 20(3). For instance, even though acts such as compulsorily obtaining specimen signatures and handwriting samples are testimonial in nature, they are not incriminating by themselves if they are used for the purpose of identification or corroboration with facts or materials that the investigators are already acquainted with. The relevant consideration for extending the protection of
 - c Article 20(3) is whether the materials are likely to lead to incrimination by themselves or “furnish a link in the chain of evidence” which could lead to the same result. Hence, reliance on the contents of compelled testimony comes within the prohibition of Article 20(3) but its use for the purpose of identification or corroboration with facts already known to the investigators is not barred.
 - d 146. It is quite evident that the narcoanalysis technique involves a testimonial act. A subject is encouraged to speak in a drug-induced state, and there is no reason why such an act should be treated any differently from verbal answers during an ordinary interrogation. In one of the impugned judgments, the compulsory administration of the narcoanalysis technique was defended on the ground that at the time of conducting the test, it is not known
 - e whether the results will eventually prove to be inculpatory or exculpatory. We have already rejected this reasoning. We see no other obstruction to the proposition that the compulsory administration of the narcoanalysis technique amounts to “testimonial compulsion” and thereby triggers the protection of Article 20(3).
 - f 147. However, an unresolved question is whether the results obtained through polygraph examination and the BEAP test are of a testimonial nature. In both these tests, inferences are drawn from the physiological responses of the subject and no direct reliance is placed on verbal responses. In some forms of polygraph examination, the subject may be required to offer verbal answers such as “Yes” or “No”, but the results are based on the measurement of changes in several physiological characteristics rather than
 - g these verbal responses. In the BEAP test, the subject is not required to give any verbal responses at all and inferences are drawn from the measurement of electrical activity in the brain. In the impugned judgments, it has been held that the results obtained from both the polygraph examination and the BEAP test do not amount to “testimony” thereby lying outside the protective scope of Article 20(3). The same assertion has been reiterated before us by the
 - h counsel for the respondents. In order to evaluate this position, we must examine the contours of the expression “testimonial compulsion”.

148. The question of what constitutes "testimonial compulsion" for the purpose of Article 20(3) was addressed in *M.P. Sharma case*⁵⁵. In that case, the Court considered whether the issuance of search warrants in the course of an investigation into the affairs of a company (following allegations of misappropriation and embezzlement) amounted to an infringement of Article 20(3). The search warrants issued under Section 96 of the erstwhile Code of Criminal Procedure, 1898 authorised the investigating agencies to search the premises and seize the documents maintained by the said company. The relevant observations were made by Jagannadhadas, J., at SCR pp. 1087-88: (AIR p. 304, para 10)

"10. ... The phrase used in Article 20(3) is 'to be a witness'. A person can 'be a witness' not merely by giving oral evidence but also by producing documents or making intelligible gestures as in the case of a dumb witness (see Section 119 of the Evidence Act) or the like. 'To be a witness' is nothing more than 'to furnish evidence', and such evidence can be furnished through the lips or by production of a thing or of a document or in other modes.

... Indeed, every positive volitional act which furnishes evidence is testimony, and testimonial compulsion connotes coercion which procures the positive volitional evidentiary acts of the person, as opposed to the negative attitude of silence or submission on his part."

149. These observations suggest that the phrase "to be a witness" is not confined to oral testimony for the purpose of invoking Article 20(3) and that it includes certain non-verbal forms of conduct such as the production of documents and the making of intelligible gestures. However, in *Kathi Kalu Oghad*⁴⁸ there was a disagreement between the majority and minority opinions on whether the expression "to be a witness" was the same as "to furnish evidence". In that case, this Court had examined whether certain statutory provisions, namely, Section 73 of the Evidence Act, Sections 5 and 6 of the Identification of Prisoners Act, 1920 and Section 27 of the Evidence Act were compatible with Article 20(3). Section 73 of the Evidence Act empowered courts to obtain specimen handwriting or signatures and finger impressions of an accused person for purposes of comparison. Sections 5 and 6 of the Identification of Prisoners Act empowered a Magistrate to obtain the photograph or measurements of an accused person. In respect of Section 27 of the Evidence Act, there was an agreement between the majority and the minority opinions that the use of compulsion to extract custodial statements amounts to an exception to the "theory of confirmation by subsequent facts". We have already referred to the relevant observations in an earlier part of this opinion.

150. Both the majority and minority opinions ruled that the other statutory provisions mentioned above were compatible with Article 20(3), but adopted different approaches to arrive at this conclusion. In the majority

⁵⁵ *M.P. Sharma v. Satish Chandra*, AIR 1954 SC 300 : 1954 Cri LJ 865 : 1954 SCR 1077

⁴⁸ *State of Bombay v. Kathi Kalu Oghad*, AIR 1961 SC 1808 : (1961) 2 Cri LJ 856 : (1962) 3 SCR 10

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opinion it was held that the ambit of the expression "to be a witness" was narrower than that of "furnishing evidence". B.P. Sinha, C.J. observed, SCR at pp. 29-32: (*Kathi Kalu Oghad case*⁴⁸, AIR pp. 1814-15, paras 10-12)

a "10. 'To be a witness' may be equivalent to 'furnishing evidence' in the sense of making oral or written statements, but not in the larger sense of the expression so as to include giving of thumb impression or impression of palm or foot or fingers or specimen writing or exposing a part of the body by an accused person for purpose of identification.

b 'Furnishing evidence' in the latter sense could not have been within the contemplation of the Constitution-makers for the simple reason that—though they may have intended to protect an accused person from the hazards of self-incrimination, in the light of the English Law on the subject—they could not have intended to put obstacles in the way of efficient and effective investigation into crime and of bringing criminals to justice. The taking of impressions of parts of the body of an accused person very often becomes necessary to help the investigation of a crime.

c It is as much necessary to protect an accused person against being compelled to incriminate himself, as to arm the agents of law and the law courts with legitimate powers to bring offenders to justice. Furthermore it must be assumed that the Constitution-makers were aware of the existing law, for example, Section 73 of the Evidence Act or Sections 5 and 6 of the Identification of Prisoners Act (33 of 1920). ...

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11. ... The giving of finger impression or of specimen signature or of handwriting, strictly speaking, is not 'to be a witness'. 'To be a witness' means imparting knowledge in respect of relevant facts, by means of oral statements or statements in writing by a person who has personal knowledge of the facts to be communicated to a court or to a person holding an enquiry or investigation. A person is said 'to be a witness' to a certain state of facts which has to be determined by a court or authority authorised to come to a decision, by testifying to what he has seen, or something he has heard which is capable of being heard and is not hit by the rule excluding hearsay, or giving his opinion, as an expert, in respect of matters in controversy. Evidence has been classified by text writers into three categories, namely, (1) oral testimony; (2) evidence furnished by documents; and (3) material evidence. We have already indicated that we are in agreement with the Full Court decision in *M.P. Sharma case*⁵⁵, that the prohibition in clause (3) of Article 20 covers not only oral testimony given by a person accused of an offence but also his written statements which may have a bearing on the controversy with reference to the charge against him. ... Self-incrimination must mean conveying information based upon the personal knowledge of the person giving the information and cannot include merely the mechanical process of producing documents in court which may throw a light on any of the points in controversy, but which do not contain any statement of the

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⁴⁸ *State of Bombay v. Kathi Kalu Oghad*, AIR 1961 SC 1808 : (1961) 2 Cri LJ 856 : (1962) 3 SCR 1055
⁵⁵ *M.P. Sharma v. Satish Chandra*, AIR 1954 SC 300 : 1954 Cri LJ 865 : 1954 SCR 1077

accused based on his personal knowledge. For example, the accused person may be in possession of a document which is in his writing or which contains his signature or his thumb impression. The production of such a document, with a view to comparison of the writing or the signature or the impression, is not the statement of an accused person, which can be said to be of the nature of a personal testimony. When an accused person is called upon by the court or any other authority holding an investigation to give his finger impression or signature or a specimen of his handwriting, he is not giving any testimony of the nature of a 'personal testimony'. The giving of a 'personal testimony' must depend upon his volition. He can make any kind of statement or may refuse to make any statement. But his finger impressions or his handwriting, in spite of efforts at concealing the true nature of it by dissimulation cannot change their intrinsic character. Thus, the giving of finger impressions or of specimen writing or of signatures by an accused person, though it may amount to furnishing evidence in the larger sense, is not included within the expression 'to be a witness'.

12. In order that a testimony by an accused person may be said to have been self-incriminatory, the compulsion of which comes within the prohibition of the constitutional provision, it must be of such a character that by itself it should have the tendency of incriminating the accused, if not also of actually doing so. In other words, it should be a statement which makes the case against the accused person at least probable, considered by itself. A specimen handwriting or signature or finger impressions by themselves are no testimony at all, being wholly innocuous because they are unchangeable except in rare cases where the ridges of the fingers or the style of writing have been tampered with. They are only materials for comparison in order to lend assurance to the court that its inference based on other pieces of evidence is reliable. They are neither oral nor documentary evidence but belong to the third category of material evidence which is outside the limit of 'testimony'.

(emphasis supplied)

151. Hence, B.P. Sinha, C.J. construed the expression "to be a witness" as one that was limited to oral or documentary evidence, while further confining the same to statements that could lead to incrimination by themselves, as opposed to those used for the purpose of identification or comparison with facts already known to the investigators. The minority opinion authored by Das Gupta, J. (three Judges) took a different approach, which is evident from the following extracts, *ibid.* at SCR pp. 40-43: (*Kathi Kalu Oghad case*⁴⁸, AIR pp. 1818-19, paras 23, 25 & 28-29)

"23. That brings us to the suggestion that the expression 'to be a witness' must be limited to a statement whether oral or in writing by an accused person imparting knowledge of relevant facts; but that mere production of some material evidence, whether documentary or

48 *State of Bombay v. Kathi Kalu Oghad*, AIR 1961 SC 1808 : (1961) 2 Cr LJ 856 : (1962) 3 SCR 10

a otherwise would not come within the ambit of this expression. This suggestion has found favour with the majority of the Bench; we think however that this is an unduly narrow interpretation. We have to remind ourselves that while on the one hand we should bear in mind that the Constitution-makers could not have intended to stifle legitimate modes of investigation we have to remember further that quite clearly they thought that certain things should not be allowed to be done, during the investigation, or trial, however helpful they might seem to be to the

b unfolding of truth and an unnecessary apprehension of disaster to the police system and the administration of justice, should not deter us from giving the words their proper meaning. It appears to us that to limit the meaning of the words 'to be a witness' in Article 20(3) in the manner suggested would result in allowing compulsion to be used in procuring the production from the accused of a large number of documents, which

c are of evidentiary value, sometimes even more so than any oral statement of a witness might be. ...

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d 25. There can be no doubt that to the ordinary user of English words, the word 'witness' is always associated with evidence, so that to say that to be a witness is to furnish evidence is really to keep to the natural meaning of the words.

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e 28. It is clear from the scheme of the various provisions, dealing with the matter that the governing idea is that to be evidence, the oral statement or a statement contained in a document, shall have a tendency to prove a fact—whether it be a fact in issue or a relevant fact—which is sought to be proved. Though this definition of evidence is in respect of proceedings in court it will be proper, once we have come to the conclusion, that the protection of Article 20(3) is available even at the stage of investigation, to hold that at that stage also the purpose of having

f a witness is to obtain evidence and the purpose of evidence is to prove a fact.

g 29. The illustrations we have given above show clearly that it is not only by imparting of his knowledge that an accused person assists the proving of a fact; he can do so even by other means, such as the production of documents which though not containing his own knowledge would have a tendency to make probable the existence of a fact in issue or a relevant fact."

h 152. Even though Das Gupta, J. saw no difference between the scope of the expressions "to be a witness" and "to furnish evidence", the learned Judge agreed with the majority's conclusion that for the purpose of invoking Article 20(3) the evidence must be incriminating by itself. This entailed that evidence could be relied upon if it is used only for the purpose of identification or comparison with information and materials that are already

in the possession of the investigators. The following observations were made at SCR pp. 45-46: (*Kathi Kalu Oghad case*⁴⁸, AIR p. 1820, paras 33-35)

"33. ... But the evidence of specimen handwriting or the impressions of the accused person's fingers, palm or foot, will incriminate him, only if on comparison of these with certain other handwritings or certain other impressions, identity between the two sets is established. By themselves, these impressions or the handwritings do not incriminate the accused person, or even tend to do so. That is why it must be held that by giving these impressions or specimen handwriting, the accused person does not furnish evidence against himself. ...

34. This view, it may be pointed out, does not in any way militate against the policy underlying the rule against 'testimonial compulsion' we have already discussed above. There is little risk, if at all, in the investigator or the prosecutor being induced to lethargy or inaction because he can get such handwriting or impressions from an accused person. For, by themselves they are of little or of no assistance to bring home the guilt of an accused. Nor is there any chance of the accused to mislead the investigator into wrong channels by furnishing false evidence. For, it is beyond his power to alter the ridges or other characteristics of his hand, palm or finger or to alter the characteristics of his handwriting.

35. We agree therefore with the conclusion reached by the majority of the Bench that there is no infringement of Article 20(3) of the Constitution by compelling an accused person to give his specimen handwriting or signature; or impressions of his fingers, palm or foot to the investigating officer or under orders of a court for the purpose of comparison under the provisions of Section 73 of the Evidence Act, 1872; though we have not been able to agree with the view of our learned brethren that 'to be a witness' in Article 20(3) should be equated with the imparting of personal knowledge or that an accused does not become a witness when he produces some document not in his own handwriting even though it may tend to prove facts in issue or relevant facts against him."

153. Since the majority decision in *Kathi Kalu Oghad*⁴⁸ is the controlling precedent, it will be useful to restate the two main premises for understanding the scope of "testimonial compulsion". The first is that ordinarily it is the oral or written statements which convey the personal knowledge of a person in respect of relevant facts that amount to "personal testimony" thereby coming within the prohibition contemplated by Article 20(3). In most cases, such "personal testimony" can be readily distinguished from material evidence such as bodily substances and other physical objects. The second premise is that in some cases, oral or written statements can be relied upon but only for the purpose of identification or comparison with facts and materials that are already in the possession of the investigators. The bar of Article 20(3) can be invoked when the statements are likely to lead to

48 *State of Bombay v. Kathi Kalu Oghad*, AIR 1961 SC 1808 : (1961) 2 Cr LJ 856 : (1962) 3 SCR 10

- a incrimination by themselves or “furnish a link in the chain of evidence” needed to do so. We must emphasise that a situation where a testimonial response is used for comparison with facts already known to the investigators is inherently different from a situation where a testimonial response helps the investigators to subsequently discover fresh facts or materials that could be relevant to the ongoing investigation.

- b 154. The recognition of the distinction between testimonial acts and physical evidence for the purpose of invoking Article 20(3) of the Constitution finds a close parallel in some foreign decisions. In *Schmerber v. California*⁶⁴, the US Supreme Court had to determine whether an involuntary blood test of a defendant had violated the Fifth Amendment. The defendant was undergoing treatment at a hospital following an automobile accident. A blood sample was taken against his will at the direction of a police officer. Analysis of the same revealed that Schmerber had been intoxicated and these results were admitted into evidence, thereby leading to his conviction for drunk driving. An objection was raised on the basis of the Fifth Amendment and the majority opinion (Brennan, J.) relied on a distinction between evidence of a “testimonial” or “communicative” nature as opposed to evidence of a “physical” or “real nature”, concluding that the privilege against self-incrimination applied to the former but not to the latter. In arriving at this decision, reference was made to several precedents with a prominent one being *Holt v. United States*⁶⁵. In that case, a defendant was forced to try on an article of clothing during the course of investigation. It had been ruled that the privilege against self-incrimination prohibited the use of compulsion to “extort communications” from the defendant, but not the use of the defendant’s body as evidence.

- e 155. In addition to citing John Wigmore’s position that “the privilege is limited to testimonial disclosures” the Court in *Schmerber*⁶⁴ also took note of other examples where it had been held that the privilege did not apply to physical evidence, which included “compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture”. However, it was cautioned that the privilege applied to testimonial communications, irrespective of what form they might take. Hence it was recognised that the privilege not only extended to verbal communications, but also to written words as well as gestures intended to communicate [for example pointing or nodding]. This line of thinking becomes clear because the majority opinion indicated that the distinction between testimonial and physical acts may not be readily applicable in the case of lie detector tests.
- f Brennan, J. had noted, US at p. 764: (*Schmerber case*⁶⁴, L Ed p. 916)

- g “Although we agree that this distinction is a helpful framework for analysis, we are not to be understood to agree with past applications in all instances. There will be many cases in which such a distinction is not readily drawn. Some tests seemingly directed to obtain ‘physical

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64 16 L Ed 2d 908 : 384 US 757 (1965)
65 54 L Ed 1021 : 218 US 245 (1910)

evidence', for example, lie detector tests measuring changes in body function during interrogation, may actually be directed to eliciting responses which are essentially testimonial. To compel a person to submit to testing in which an effort will be made to determine his guilt or innocence on the basis of physiological responses, whether willed or not, is to evoke the spirit and history of the Fifth Amendment. Such situations call to mind the principle that the protection of the privilege 'is as broad as the mischief against which it seeks to guard'."

156. In a recently published paper, Michael S. Pardo (2008) has made the following observation in respect of this judgment [cited from Michael S. Pardo, "Self-Incrimination and the Epistemology of Testimony"⁶⁶, *Cardozo Law Review* at pp. 1027-28]:

"the Court notes that even the physical-testimonial distinction may break down when physical evidence is meant to compel 'responses which are essentially testimonial' such as a lie detector test measuring physiological responses during interrogation."

157. Following *Schmerber*⁶⁴ decision, the distinction between physical and testimonial evidence has been applied in several cases. However, some complexities have also arisen in the application of the testimonial-physical distinction to various fact situations. While we do not need to discuss these cases to decide the question before us, we must take note of the fact that the application of the testimonial-physical distinction can be highly ambiguous in relation to non-verbal forms of conduct which nevertheless convey relevant information.

158. Among other jurisdictions, the European Court of Human Rights (ECtHR) has also taken note of the distinction between testimonial and physical acts for the purpose of invoking the privilege against self-incrimination. In *Saunders v. United Kingdom*⁶⁷, it was explained:

"... The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused. In this sense the right is closely linked to the presumption of innocence ... The right not to incriminate oneself is primarily concerned, however, with respecting the will of an accused person to remain silent. As commonly understood in the legal systems of the Contracting Parties to the Convention and elsewhere, it does not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as, inter alia, documents acquired pursuant to a warrant, breath, blood and urine samples and bodily tissue for the purpose of DNA testing."

66 30 *Cardozo Law Review* 1023-46 (December 2008)

64 *Schmerber v. California*, 16 L Ed 2d 908 : 384 US 757 (1965)

67 (1996) 23 EHRR 313

Evolution of the law on “medical examination”

a 159. With respect to the testimonial-physical distinction, an important statutory development in our legal system was the introduction of provisions for medical examination with the overhauling of the Code of Criminal Procedure in 1973. Sections 53 and 54 CrPC contemplate the medical examination of a person who has been arrested either at the instance of the investigating officer or even the arrested person himself. The same can also be done at the direction of the jurisdictional court.

b 160. However, there were no provisions for authorising such a medical examination in the erstwhile Code of Criminal Procedure, 1898. The absence of a statutory basis for the same had led courts to hold that a medical examination could not be conducted without the prior consent of the person who was to be subjected to the same. For example in *Bhondar v. Emperor*⁶⁸, Lord Williams, J. held at AIR p. 602:

c “... If it were permitted forcibly to take hold of a prisoner and examine his body medically for the purpose of qualifying some medical witness to give medical evidence in the case against the accused there is no knowing where such procedure would stop. ... Any such examination without the consent of the accused would amount to an assault and I am quite satisfied that the police are not entitled without statutory authority to commit assaults upon prisoners for the purpose of procuring evidence against them. If the legislature desires that evidence of this kind should be given, it will be quite simple to add a short section to the Code of Criminal Procedure expressly giving power to order such a medical examination.”

e 161. S.K. Ghose, J. concurred, at AIR p. 604: (*Bhondar case*⁶⁸)

f “... Nevertheless the examination of an arrested person in hospital by a doctor, not for the benefit of the prisoner’s health, but simply by way of a second search, is not provided for by the Code, and in such a case the doctor may not examine the prisoner without his consent. It would be a rule of caution to have such consent noted in the medical report, so that the doctor would be in a position to testify to such consent if called upon to do so.”

g A similar conclusion was arrived at by Tarkunde, J. in *Deomam Shamji Patel v. State of Maharashtra*⁶⁹, who held that a person suspected or accused of having committed an offence cannot be forcibly subjected to a medical examination. It was also held that if police officers use force for this purpose, then a person can lawfully exercise the right of private defence to offer resistance.

h 162. It was the 37th and 41st Reports of the Law Commission of India which recommended the insertion of a provision in the Code of Criminal Procedure to enable medical examination without the consent of an accused.

⁶⁸ AIR 1931 Cal 601

⁶⁹ AIR 1959 Bom 284

These recommendations proved to be the precursor for the inclusion of Sections 53 and 54 in the Code of Criminal Procedure, 1973. It was observed in the 37th Report (December 1967) at pp. 205-06:

“... it will suffice to refer to the decision of the Supreme Court in *Kathi Kalu*⁴⁸, which has the effect of confining the privilege under Article 20(3) to testimony—written or oral. The Supreme Court’s judgment in *Kathi Kalu*⁴⁸ should be taken as overruling the view taken in some earlier decisions, invalidating provisions similar to Section 5, Identification of Prisoners Act, 1920.”

The position in USA has been summarized (Emerson G. Spies, *Due Process and the American Criminal Trial*⁷⁰).

‘Less certain is the protection accorded to the defendant with regard to non-testimonial physical evidence other than personal papers. Can the accused be forced to supply a sample of his blood or urine if the resultant tests are likely to further the prosecution’s case? Can he be forced to give his fingerprints to wear a disguise or certain clothing, to supply a pair of shoes which might match footprints at the scene of the crime, to stand in a line up, to submit to a hair cut or to having his hair dyed, or to have his stomach pumped or a fluoroscopic examination of the contents of his intestines? The literature on this aspect of self-incrimination is voluminous.’

The short and reasonably accurate answer to the question posed is that almost all such physical acts can be required. Influenced by the historical development of the doctrine, its purpose, and the need to balance the conflicting interests of the individual and society, the courts have generally restricted the protection of the Fifth Amendment to situations where the defendant would be required to convey ideas, or where the physical acts would offend the decencies of civilised conduct.”

(some internal citations omitted)

163. Taking note of *Kathi Kalu Oghad*⁴⁸ and the distinction drawn between testimonial and physical acts in the American cases, the Law Commission observed that a provision for examination of the body would reveal valuable evidence. This view was taken forward in the 41st Report which recommended the inclusion of a specific provision to enable medical examination during the course of investigation, irrespective of the subject’s consent. [See *The 41st Report of the Law Commission of India*, Vol. I (September 1969), Para 5.1 at p. 37.]

164. We were also alerted to some High Court decisions which have relied on *Kathi Kalu Oghad*⁴⁸ to approve the taking of physical evidence such as blood and hair samples in the course of investigation. Following the overhaul of the Code of Criminal Procedure in 1973, the position became amply clear. In recent years, the judicial power to order a medical examination, albeit in a different context, has been discussed by this Court in *Sharda v. Dharmpal*⁷¹. In that case, the contention related to the validity of a

48 *State of Bombay v. Kathi Kalu Oghad*, AIR 1961 SC 1808 : (1961) 2 Cr LJ 856 : (1962) 3 SCR 1070 38 Australian Law Journal 223, 231 (1964)

71 (2003) 4 SCC 493

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a civil court's direction for conducting a medical examination to ascertain the mental state of a party in a divorce proceeding. Needless to say, the mental state of a party was a relevant issue before the trial court, since insanity is a statutory ground for obtaining divorce under the Hindu Marriage Act, 1955. S.B. Sinha, J. held that Article 20(3) was anyway not applicable in a civil proceeding and that the civil court could direct the medical examination in exercise of its inherent powers under Section 151 of the Code of Civil Procedure, since there was no ordinary statutory basis for the same. It was observed: (*Sharda case*⁷¹, SCC pp. 508-09, paras 32-37)

b "32. Yet again the primary duty of a court is to see that truth is arrived at. A party to a civil litigation, it is axiomatic, is not entitled to constitutional protections under Article 20 of the Constitution of India. Thus, the civil court although may not have any specific provisions in the Code of Civil Procedure and the Evidence Act, has an inherent power in terms of Section 151 of the Code of Civil Procedure to pass all orders for doing complete justice to the parties to the suit.

c 33. Discretionary power under Section 151 of the Code of Civil Procedure, it is trite, can be exercised also on an application filed by the party.

d 34. In certain cases medical examination by the experts in the field may not only be found to be leading to the truth of the matter but may also lead to removal of misunderstanding between the parties. It may bring the parties to terms.

e 35. Having regard to development in medicinal technology, it is possible to find out that what was presumed to be a mental disorder of a spouse is not really so.

36. In matrimonial disputes, the court has also a conciliatory role to play—even for the said purpose it may require expert advice.

37. Under Section 75(e) of the Code of Civil Procedure and Order 26 Rule 10-A the civil court has the requisite power to issue a direction to hold a scientific, technical or expert investigation."

f The decision had also cited some foreign precedents dealing with the authority of investigators and courts to require the collection of DNA samples for the purpose of comparison. In that case the discussion centered on the "right to privacy". So far, the authority of investigators and courts to compel the production of DNA samples has been approved by the Orissa High Court in *Thogorani v. State of Orissa*⁷².

g 165. At this juncture, it should be noted that the Explanation to Sections 53, 53-A and 54 of the Code of Criminal Procedure, 1973 was amended in 2005 to clarify the scope of medical examination, especially with regard to the extraction of bodily substances. The amended provision reads:

"53. Examination of accused by medical practitioner at the request of police officer.—(1) When a person is arrested on a charge of committing an

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71 *Sharda v. Dharmpal*, (2003) 4 SCC 493
72 2004 Cri LJ 4003 (Ori)

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offence of such a nature and alleged to have been committed under such circumstances that there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of an offence, it shall be lawful for a registered medical practitioner, acting at the request of a police officer not below the rank of sub-inspector, and for any person acting in good faith in his aid and under his direction, to make such an examination of the person arrested as is reasonably necessary in order to ascertain the facts which may afford such evidence, and to use such force as is reasonably necessary for that purpose.

(2) Whenever the person of a female is to be examined under this section, the examination shall be made only by, or under the supervision of, a female registered medical practitioner.

Explanation.—In this section and in Sections 53-A and 54,—

(a) ‘examination’ shall include the examination of blood, blood stains, semen, swabs in case of sexual offences, sputum and sweat, hair samples and finger nail clippings by the use of modern and scientific techniques including DNA profiling and such other tests which the registered medical practitioner thinks necessary in a particular case;

(b) ‘registered medical practitioner’ means a medical practitioner who possesses any medical qualification as defined in clause (h) of Section 2 of the Indian Medical Council Act, 1956 (102 of 1956) and whose name has been entered in a State Medical Register.”

(emphasis supplied)

166. The respondents have urged that the impugned techniques should be read into the relevant provisions i.e. Sections 53 and 54 CrPC. As described earlier, a medical examination of an arrested person can be directed during the course of an investigation either at the instance of the investigating officer or the arrested person. It has also been clarified that it is within the powers of a court to direct such a medical examination on its own. Such an examination can also be directed in respect of a person who has been released from custody on bail as well as a person who has been granted anticipatory bail. Furthermore, Section 53 contemplates the use of “force as is reasonably necessary” for conducting a medical examination. This means that once a court has directed the medical examination of a particular person, it is within the powers of the investigators and the examiners to resort to a reasonable degree of physical force for conducting the same.

167. The contentious provision is the Explanation to Section 53 CrPC (amended in 2005) which has been reproduced above. It has been contended that the phrase “modern and scientific techniques including DNA profiling and such other tests” should be liberally construed to include the impugned techniques. It was argued that even though the narcoanalysis technique, polygraph examination and the BEAP test have not been expressly enumerated, they could be read in by examining the legislative intent. Emphasis was placed on the phrase “and such other tests” to argue that Parliament had chosen an approach where the list of “modern and scientific techniques” contemplated was illustrative and not exhaustive. It was also argued that in any case, statutory provisions can be liberally construed in

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light of scientific advancements. With the development of newer technologies, their use can be governed by older statutes which had been framed to regulate the older technologies used for similar purposes.

168. On the other hand, the counsel for the appellants have contended that Parliament was well aware of the impugned techniques at the time of the 2005 Amendment and consciously chose not to include them in the amended Explanation to Section 53 CrPC. It was reasoned that this choice recognised the distinction between testimonial acts and physical evidence. While bodily substances such as blood, semen, sputum, sweat, hair and fingernail clippings can be readily characterised as physical evidence, the same cannot be said for the techniques in question. This argument was supported by invoking the rule of “ejusdem generis” which is used in the interpretation of statutes. This rule entails that the meaning of general words which follow specific words in a statutory provision should be construed in light of the commonality between those specific words. In the present case, the substances enumerated are all examples of physical evidence. Hence the words “and such other tests” which appear in the Explanation to Section 53 CrPC should be construed to include the examination of physical evidence but not that of testimonial acts.

169. We are inclined towards the view that the results of the impugned tests should be treated as testimonial acts for the purpose of invoking the right against self-incrimination. Therefore, it would be prudent to state that the phrase “and such other tests” [which appears in the Explanation to Section 53 CrPC] should be read so as to confine its meaning to include only those tests which involve the examination of physical evidence. In pursuance of this line of reasoning, we agree with the appellant’s contention about the applicability of the rule of “ejusdem generis”. It should also be noted that the Explanation to Section 53 CrPC does not enumerate certain other forms of medical examination that involve testimonial acts, such as psychiatric examination among others. This demonstrates that the amendment to this provision was informed by a rational distinction between the examination of physical substances and testimonial acts.

170. However, the submissions touching on the legislative intent require some reflection. While it is most likely that Parliament was well aware of the impugned techniques at the time of the 2005 Amendment to CrPC and deliberately chose not to enumerate them, we cannot arrive at a conclusive finding on this issue. While it is open to courts to examine the legislative history of a statutory provision, it is not proper for us to try and conclusively ascertain the legislative intent. Such an inquiry is impractical since we do not have access to all the materials which would have been considered by Parliament. In such a scenario, we must address the respondent’s arguments about the interpretation of statutes with regard to scientific advancements. To address this aspect, we can refer to some extracts from a leading commentary on the interpretation of statutes [see Justice G.P. Singh, *Principles of Statutory Interpretation*, (10th Edn. 2006) at pp. 239-47]. The learned author has noted, at pp. 240-41:

“Reference to the circumstances existing at the time of the passing of the statute does not, therefore, mean that the language used, at any rate, in a modern statute, should be held to be inapplicable to social, political and economic developments or to scientific inventions not known at the time of the passing of the statute. ... The question again is as to what was the intention of the law-makers: did they intend as originalists may argue, that the words of the statute be given the meaning they would have received immediately after the statute’s enactment or did they intend as dynamists may contend that it would be proper for the court to adopt the current meaning of the words? The courts have now generally leaned in favour of dynamic construction. ... But the doctrine has also its limitations. For example it does not mean that the language of an old statute can be construed to embrace something conceptually different.

The guidance on the question as to when an old statute can apply to new state of affairs not in contemplation when the statute was enacted was furnished by Lord Wilberforce in his dissenting speech in *Royal College of Nursing of the United Kingdom v. Deptt. of Health and Social Security*⁷³, which is now treated as authoritative. ... Lord Wilberforce said, at All ER pp. 564-65: (AC p. 822 B-E)

‘In interpreting an Act of Parliament it is proper, and indeed necessary, to have regard to the state of affairs existing, and known by Parliament to be existing, at the time. It is a fair presumption that Parliament’s policy or intention is directed to that state of affairs. Leaving aside cases of omission by inadvertence, this being not such a case, when a new state of affairs, or a fresh set of facts bearing on policy, comes into existence, the courts have to consider whether they fall within the parliamentary intention. They may be held to do so, if they fall within the same genus of facts as those to which the expressed policy has been formulated. They may also be held to do so if there can be detected a clear purpose in the legislation which can only be fulfilled if the extension is made. How liberally these principles may be applied must depend upon the nature of the enactment, and the strictness or otherwise of the words in which it has been expressed. The courts should be less willing to extend expressed meanings if it is clear that the Act in question was designed to be restrictive or circumscribed in its operation rather than liberal or permissive. They will be much less willing to do so where the subject-matter is different in kind or dimension from that for which the legislation was passed. In any event there is one course which the courts cannot take under the law of this country; they cannot fill gaps; they cannot by asking the question “What would Parliament have done in this current case—not being one in contemplation—if the facts had been before it?” attempt themselves to supply the answer, if the answer is not to be found in the terms of the Act itself.’ (internal citations omitted)

73 1981 AC 800 : (1981) 2 W.L.R. 279 : (1981) 1 All ER 545 (H.L.)

171. The learned author has further taken note of several decisions where general words appearing in statutory provisions have been liberally interpreted to include newer scientific inventions and technologies [*ibid.* at pp. 244-46.] The relevant portion of the commentary quotes Subba Rao, J. in *Senior Electric Inspector v. Laxminarayan Chopra*⁷⁴: (AIR p. 163, para 8)

"8. ... It is perhaps difficult to attribute to a legislative body functioning in a static society that its intention was couched in terms of considerable breadth so as to take within its sweep the future developments comprehended by the phraseology used. It is more reasonable to confine its intention only to the circumstances obtaining at the time the law was made. But in a modern progressive society it would be unreasonable to confine the intention of a legislature to the meaning attributable to the word used at the time the law was made, for a modern legislature making laws to govern a society which is fast moving must be presumed to be aware of an enlarged meaning the same concept might attract with the march of time and with the revolutionary changes brought about in social, economic, political and scientific and other fields of human activity. Indeed, unless a contrary intention appears, an interpretation should be given to the words used to take in new facts and situations, if the words are capable of comprehending them."

172. In light of this discussion, there are some clear obstructions to the dynamic interpretation of the amended Explanation to Section 53 CrPC. Firstly, the general words in question i.e. "and such other tests" should ordinarily be read to include tests which are in the same genus as the other forms of medical examination that have been specified. Since all the explicit references are to the examination of bodily substances, we cannot readily construe the said phrase to include the impugned tests because the latter seem to involve testimonial responses. Secondly, the compulsory administration of the impugned techniques is not the only means for ensuring an expeditious investigation. Furthermore, there is also a safe presumption that Parliament was well aware of the existence of the impugned techniques but deliberately chose not to enumerate them. Hence, on an aggregate understanding of the materials produced before us we lean towards the view that the impugned tests i.e. the narcoanalysis technique, polygraph examination and the BEAP test should not be read into the provisions for "medical examination" under the Code of Criminal Procedure, 1973.

173. However, it must be borne in mind that even though the impugned techniques have not been expressly enumerated in CrPC there is no statutory prohibition against them either. It is a clear case of silence in the law. Furthermore, in circumstances where an individual consents to undergo these tests, there is no dilution of Article 20(3). In the past, the meaning and scope of the term "investigation" has been held to include measures that had not been enumerated in statutory provisions. For example, prior to the enactment of an express provision for medical examination in CrPC, it was observed in

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*Mahipal Maderna v. State of Rajasthan*⁷⁵, that an order requiring the production of a hair sample comes within the ordinary understanding of "investigation" (at Cri LJ pp. 1409-10, para 17).

174. We must also take note of the decision in *Jamshed v. State of U.P.*⁷⁶, wherein it was held that a blood sample can be compulsorily extracted during a "medical examination" conducted under Section 53 CrPC. At that time, the collection of blood samples was not expressly contemplated in the said provision. Nevertheless, the Court had ruled that the phrase "examination of a person" should be read liberally so as to include an examination of what is externally visible on a body as well as the examination of an organ inside the body (see Cri LJ p. 1689, para 13).

175. We must also refer back to the substance of the decision in *Sharda v. Dharmpal*⁷¹ which upheld the authority of a civil court to order a medical examination in exercise of the inherent powers vested in it by Section 151 of the Code of Civil Procedure, 1908. The same reasoning cannot be readily applied in the criminal context. Despite the absence of a statutory basis, it is tenable to hold that criminal courts should be allowed to direct the impugned tests with the subject's consent, keeping in mind that there is no statutory prohibition against them either.

176. Another pertinent contention raised by the appellants is that the involvement of medical personnel in the compulsory administration of the impugned tests is violative of their professional ethics. In particular, criticism was directed against the involvement of doctors in the narcoanalysis technique and it was urged that since the content of the drug-induced revelations were shared with investigators, this technique breaches the duty of confidentiality which should be ordinarily maintained by medical practitioners. [See generally Amar Jesani, "Willing Participants and Tolerant Profession: Medical Ethics and Human Rights in Narcoanalysis", *Indian Journal of Medical Ethics*, Vol. 16(3), July-September 2008.]

177. The counsel have also cited the text of the "Principles of Medical Ethics" adopted by the United Nations General Assembly [GA Res. 37/194, 111th Plenary Meeting] on 18-12-1982. This document enumerates some "Principles of Medical Ethics relevant to the role of health personnel, particularly physicians, in the protection of prisoners and detainees against torture, and other cruel, inhuman or degrading treatment or punishment". Emphasis was placed on Principle 4 which reads:

"Principle 4

It is a contravention of medical ethics for health personnel, particularly physicians:

To apply their knowledge and skills in order to assist in the interrogation of prisoners and detainees in a manner that may adversely affect the physical or mental health or condition of such prisoners or

75 1971 Cri LJ 1405 (Raj)

76 1976 Cri LJ 1680 (All)

71 (2003) 4 SCC 493

detainees and which is not in accordance with the relevant international instruments;”.

- a 178. Being a court of law, we do not have the expertise to mould the specifics of professional ethics for the medical profession. Furthermore, the involvement of doctors in the course of investigation in criminal cases has long been recognised as an exception to the physician-patient privilege. In the Indian context, the statutory provisions for directing a medical examination are an example of the same. Fields such as forensic toxicology
- b have become important in criminal justice systems all over the world and doctors are frequently called on to examine bodily substances such as samples of blood, hair, semen, saliva, sweat, sputum and fingernail clippings as well as marks, wounds and other physical characteristics. A reasonable limitation on the forensic uses of medical expertise is the fact that testimonial acts such as the results of a psychiatric examination cannot be used as
- c evidence without the subject’s informed consent.

Results of the impugned tests should be treated as “personal testimony”

- d 179. We now return to the operative question of whether the results obtained through polygraph examination and the BEAP test should be treated as testimonial responses. Ordinarily evidence is classified into three broad categories, namely, oral testimony, documents and material evidence. The protective scope of Article 20(3) read with Section 161(2) CrPC guards against the compulsory extraction of oral testimony, even at the stage of investigation. With respect to the production of documents, the applicability of Article 20(3) is decided by the trial Judge but parties are obliged to produce documents in the first place. However, the compulsory extraction of material (or physical) evidence lies outside the protective scope of Article
- e 20(3). Furthermore, even testimony in oral or written form can be required under compulsion if it is to be used for the purpose of identification or comparison with materials and information that is already in the possession of investigators.

- f 180. We have already stated that the narcoanalysis test includes substantial reliance on verbal statements by the test subject and hence its involuntary administration offends the “right against self-incrimination”. The crucial test laid down in *Kathi Kalu Oghad*⁴⁸ is that of

“imparting knowledge in respect of relevant facts, by means of oral statements or statements in writing by a person who has personal knowledge of the facts to be communicated to a court or to a person holding an enquiry or investigation” (*ibid.* at SCR p. 30.).

- g The difficulty arises since the majority opinion in that case appears to confine the understanding of “personal testimony” to the conveyance of personal knowledge through oral statements or statements in writing. The results obtained from polygraph examination or a BEAP test are not in the nature of oral or written statements. Instead, inferences are drawn from the measurement of physiological responses recorded during the performance of
- h these tests. It could also be argued that tests such as polygraph examination

48 *State of Bombay v. Kathi Kalu Oghad*, AIR 1961 SC 1808 : (1961) 2 Cri LJ 856 : (1962) 3 SCR 10

and the BEAP test do not involve a “positive volitional act” on part of the test subject and hence their results should not be treated as testimony. However, this does not entail that the results of these two tests should be likened to physical evidence and thereby excluded from the protective scope of Article 20(3). a

181. We must refer back to the substance of the decision in *Kathi Kalu Oghad*⁴⁸ which equated a testimonial act with the imparting of knowledge by a person who has personal knowledge of the facts that are in issue. It has been recognised in other decisions that such personal knowledge about relevant facts can also be communicated through means other than oral or written statements. For example in *M.P. Sharma case*⁵⁵, it was noted that “...evidence can be furnished through the lips or by production of a thing or of a document or in other modes.” (*ibid.* at SCR p. 1087) Furthermore, common sense dictates that certain communicative gestures such as pointing or nodding can also convey personal knowledge about a relevant fact, without offering a verbal response. It is quite foreseeable that such a communicative gesture may by itself expose a person to “criminal charges or penalties” or furnish a link in the chain of evidence needed for prosecution. b
c,

182. We must also highlight that there is nothing to show that the learned Judges in *Kathi Kalu Oghad*⁴⁸ had contemplated the impugned techniques while discussing the scope of the phrase “to be a witness” for the purpose of Article 20(3). At that time, the transmission of knowledge through means other than speech or writing was not something that could have been easily conceived of. Techniques such as polygraph examination were fairly obscure and were the subject of experimentation in some western nations while the BEAP technique was developed several years later. Just as the interpretation of statutes has to be often re-examined in light of scientific advancements, we should also be willing to re-examine judicial observations with a progressive lens. d
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183. An explicit reference to the lie detector tests was of course made by the US Supreme Court in *Schmerber*⁶⁴ decision, wherein Brennan, J. had observed at US p. 764: (L Ed p. 916)

“... To compel a person to submit to testing in which an effort will be made to determine his guilt or innocence on the basis of physiological responses, whether willed or not, is to evoke the spirit and history of the Fifth Amendment.” f

184. Even though the actual process of undergoing a polygraph examination or a BEAP test is not the same as that of making an oral or written statement, the consequences are similar. By making inferences from the results of these tests, the examiner is able to derive knowledge from the subject’s mind which otherwise would not have become available to the investigators. These two tests are different from medical examination and the g

48 *State of Bombay v. Kathi Kalu Oghad*, AIR 1961 SC 1808 : (1961) 2 Cr LJ 856 : (1962) 3 SCR 10 h

55 *M.P. Sharma v. Satish Chandra*, AIR 1954 SC 300 : 1954 Cr LJ 865 : 1954 SCR 1077

64 *Schmerber v. California*, 16 L Ed 2d 908 : 384 US 757 (1965)

a analysis of bodily substances such as blood, semen and hair samples, since the test subject's physiological responses are directly correlated to mental faculties. Through lie detection or gauging a subject's familiarity with the stimuli, personal knowledge is conveyed in respect of a relevant fact. It is also significant that unlike the case of documents, the investigators cannot possibly have any prior knowledge of the test subject's thoughts and memories, either in the actual or constructive sense. Therefore, even if a highly strained analogy were to be made between the results obtained from the impugned tests and the production of documents, the weight of precedents leans towards restrictions on the extraction of "personal knowledge" through such means.

c 185. During the administration of a polygraph test or a BEAP test, the subject makes a mental effort which is accompanied by certain physiological responses. The measurement of these responses then becomes the basis of the transmission of knowledge to the investigators. This knowledge may aid an ongoing investigation or lead to the discovery of fresh evidence which could then be used to prosecute the test subject. In any case, the compulsory administration of the impugned tests impedes the subject's right to choose between remaining silent and offering substantive information. The requirement of a "positive volitional act" becomes irrelevant since the subject is compelled to convey personal knowledge irrespective of his/her own volition.

d 186. Some academics have also argued that the results obtained from tests such as polygraph examination are "testimonial" acts that should come within the prohibition of the right against self-incrimination. For instance, Michael S. Pardo (2008) has observed [cited from Michael S. Pardo, "Self-Incrimination and the Epistemology of Testimony"⁶⁶, *Cardozo Law Review* at p. 1046]:

e "The results of polygraphs and other lie detection tests, whether they call for a voluntary response or not, are testimonial because the tests are just inductive evidence of the defendant's epistemic state. They are evidence that purports to tell us either: (1) that we can or cannot rely on the assertions made by the defendant and for which he has represented himself to be an authority, or (2) what propositions the defendant would assume authority for and would invite reliance upon, were he to testify truthfully."

f 187. Ronald J. Allen and M. Kristin Mace (2004) have offered a theory that the right against self-incrimination is meant to protect an individual in a situation where the State places reliance on the "substantive results of cognition". The following definition of "cognition" has been articulated to explain this position [cited from Ronald J. Allen and M. Kristin Mace, "The Self-Incrimination Clause Explained and its Future Predicted"⁷⁷, *Journal of Criminal Law and Criminology*, Fn. 16 at p. 247]:

g "... 'cognition' is used herein to refer to these intellectual processes that allow one to gain and make use of substantive knowledge and to

h ⁶⁶ 30 *Cardozo Law Review* 1023-46 (December 2008)

⁷⁷ 94 *Journal of Criminal Law and Criminology* 243-293 (2004)

compare one's 'inner world' (previous knowledge) with the 'outside world' (stimuli such as questions from an interrogator). Excluded are simple psychological responses to stimuli such as fear, warmth, and hunger: the mental processes that produce muscular movements; and one's will or faculty for choice. ..." (internal citations omitted)

The abovementioned authors have taken a hypothetical example where the inferences drawn from an involuntary polygraph test that did not require verbal answers, led to the discovery of incriminating evidence. They have argued that if the scope of the Fifth Amendment extends to protecting the subject in respect of "substantive results of cognition", then reliance on polygraph test results would violate the said right.

188. A similar conclusion has also been made by the National Human Rights Commission, as is evident from the following extract in the *Guidelines Relating to Administration of Polygraph Test (Lie Detector Test) on an Accused (2000)*:

"The extent and nature of the 'self-incrimination' is wide enough to cover the kinds of statements that were sought to be induced. In *M.P. Sharma*⁵⁵ the Supreme Court included within the protection of the self-incrimination rule all positive volitional acts which furnish evidence. This by itself would have made all or any interrogation impossible. The test—as stated in *Kathi Kalu Oghad*⁴⁸—retains the requirement of personal volition and states that 'self-incrimination' must mean conveying information based upon the personal knowledge of the person giving information. By either test, the information sought to be elicited in a lie detector test is information in the personal knowledge of the accused."

189. In light of the preceding discussion, we are of the view that the results obtained from tests such as polygraph examination and the BEAP test should also be treated as "personal testimony", since they are a means for "imparting personal knowledge about relevant facts". Hence, our conclusion is that the results obtained through the involuntary administration of either of the impugned tests (i.e. the narcoanalysis technique, polygraph examination and the BEAP test) come within the scope of "testimonial compulsion", thereby attracting the protective shield of Article 20(3).

II. Whether the involuntary administration of the impugned techniques is a reasonable restriction on "personal liberty" as understood in the context of Article 21 of the Constitution?

190. The preceding discussion does not conclusively address the contentions before us. Article 20(3) protects a person who is "formally accused" of having committed an offence or even a suspect or a witness who is questioned during an investigation in a criminal case. However, Article 20(3) is not applicable when a person gives his/her informed consent to undergo any of the impugned tests. It has also been described earlier that the

⁵⁵ *M.P. Sharma v. Satish Chandra*, AIR 1954 SC 300 : 1954 Cri LJ 865 : 1954 SCR 1077

⁴⁸ *State of Bombay v. Kathi Kalu Oghad*, AIR 1961 SC 1808 : (1961) 2 Cri LJ 856 : (1962) 3 SCR 10

a “right against self-incrimination” does not protect persons who may be compelled to undergo the tests in the course of administrative proceedings or any other proceedings which may result in civil liability. It is also conceivable that a person who is forced to undergo these tests may not subsequently face criminal charges. In this context, Article 20(3) will not apply in situations where the test results could become the basis of non-penal consequences for the subject such as custodial abuse, police surveillance and harassment among others.

b 191. In order to account for these possibilities, we must examine whether the involuntary administration of any of these tests is compatible with the constitutional guarantee of “substantive due process”. The standard of “substantive due process” is of course the threshold for examining the validity of all categories of governmental action that tend to infringe upon the idea of “personal liberty”. We will proceed with this inquiry with regard to the various dimensions of “personal liberty” as understood in the context of Article 21 of the Constitution, which lays down that:

c “21. *Protection of life and personal liberty.*—No person shall be deprived of his life or personal liberty except according to procedure established by law.”

d 192. Since administering the impugned tests entails the physical confinement of the subject, it is important to consider whether they can be read into an existing statutory provision. This is so because any form of restraint on personal liberty, howsoever slight it may be, must have a basis in law. However, we have already explained how it would not be prudent to read the Explanation to Section 53 CrPC in an expansive manner so as to include the impugned techniques. The second line of inquiry is whether the involuntary administration of these tests offends certain rights that have been read into Article 21 by way of judicial precedents. The contentions before us have touched on aspects such as the “right to privacy” and the “right against cruel, inhuman and degrading treatment”. The third line of inquiry is structured around the right to fair trial which is an essential component of “personal liberty”.

f 193. There are several ways in which the involuntary administration of either of the impugned tests could be viewed as a restraint on “personal liberty”. The most obvious indicator of restraint is the use of physical force to ensure that an unwilling person is confined to the premises where the tests are to be conducted. Furthermore, the drug-induced revelations or the substantive inferences drawn from the measurement of the subject’s physiological responses can be described as an intrusion into the subject’s mental privacy. It is also quite conceivable that a person could make an incriminating statement on being threatened with the prospective administration of any of these techniques. Conversely, a person who has been forcibly subjected to these techniques could be confronted with the results in a subsequent interrogation, thereby eliciting incriminating statements.

g 194. We must also account for circumstances where a person who undergoes the said tests is subsequently exposed to harmful consequences, though not of a penal nature. We have already expressed our concern with

situations where the contents of the test results could prompt investigators to engage in custodial abuse, surveillance or undue harassment. We have also been apprised of some instances where the investigating agencies have leaked the video recordings of narcoanalysis interviews to media organisations. This is an especially worrisome practice since the public distribution of these recordings can expose the subject to undue social stigma and specific risks. It may even encourage acts of vigilantism in addition to a "trial by media".

195. We must remember that the law does provide for some restrictions on "personal liberty" in the routine exercise of police powers. For instance, CrPC incorporates an elaborate scheme prescribing the powers of arrest, detention, interrogation, search and seizure. A fundamental premise of the criminal justice system is that the police and the judiciary are empowered to exercise a reasonable degree of coercive powers. Hence, the provision that enables courts to order a person who is under arrest to undergo a medical examination also provides for the use of "force as is reasonably necessary" for this purpose. It is evident that the notion of "personal liberty" does not grant rights in the absolute sense and the validity of restrictions placed on the same needs to be evaluated on the basis of criterion such as "fairness, non-arbitrariness and reasonableness".

196. Both the appellants and the respondents have cited cases involving the compelled extraction of blood samples in a variety of settings. An analogy has been drawn between the pinprick of a needle for extracting a blood sample and the intravenous administration of drugs such as sodium pentothal. Even though the extracted sample of blood is purely physical evidence as opposed to a narcoanalysis interview where the test subject offers testimonial responses, the comparison can be sustained to examine whether puncturing the skin with a needle or an injection is an unreasonable restraint on "personal liberty".

197. The decision given by the US Supreme Court in *Rochin v. California*⁵⁴, recognised the threshold of "conduct that shocks the conscience" for deciding when the extraction of physical evidence offends the guarantee of "due process of law". With regard to the facts in that case, Felix Frankfurter, J. had decided that the extraction of evidence had indeed violated the same, *ibid.* at US pp. 172-73: (L Ed pp. 190-91)

"... we are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combating crime too energetically. This is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents—this course of proceeding by agents of Government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation. ... Use of involuntary verbal confessions in State criminal trials is constitutionally obnoxious not only because of their unreliability.

54 96 L Ed 183 : 342 US 165 (1951)

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They are inadmissible under the due process clause even though statements contained in them may be independently established as true. Coerced confessions offend the community's sense of fair play and decency. So here, to sanction the brutal conduct which naturally enough was condemned by the court whose judgment is before us, would be to afford brutality the cloak of law. Nothing would be more calculated to discredit law and thereby to brutalise the temper of a society."

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- b 198. Coming to the cases cited before us, in *State of Maharashtra v. Sheshappa Dudhappa Tambade*⁷⁸, the Bombay High Court had upheld the constitutionality of Section 129-A of the Bombay Prohibition Act, 1949. This provision empowered the Prohibition Officers and police personnel to produce a person for "medical examination", which could include the collection of a blood sample. The said provision authorised the use of "all means reasonably necessary to secure the production of such person or the examination of his body or the collection of blood necessary for the test".
- c Evidently, the intent behind this provision was to enforce the policy of prohibition on the consumption of intoxicating liquors. Among other questions, the Court also ruled that this provision did not violate Article 21.

- d 199. Reliance was placed on a decision of the US Supreme Court in *Breithaupt v. Abram*⁷⁹, wherein the contentious issue was whether a conviction on the basis of an involuntary blood test violated the guarantee of "due process of law". In deciding that the involuntary extraction of the blood sample did not violate the guarantee of "due process of law", Clark, J. observed at US pp. 435-37: (L Ed pp. 451-52)

- e "... there is nothing 'brutal' or 'offensive' in the taking of a blood sample when done, as in this case, under the protective eye of a physician. To be sure, the driver here was unconscious when the blood was taken, but the absence of conscious consent, without more, does not necessarily render the taking a violation of a constitutional right; and certainly the test was administered here would not be considered offensive by even the most delicate. Furthermore, due process is not measured by the yardstick of personal reaction or the sphygmogram of the most sensitive person, but by that whole community sense of 'decency and fairness' that has been woven by common experience into the fabric of acceptable conduct. It is on this bedrock that this Court has established the concept of due process. The blood test procedure has become routine in our everyday life. It is a ritual for those going into the military service as well as those applying for marriage licenses. Many colleges require such tests before permitting entrance and literally millions of us have voluntarily gone through the same, though a longer, routine in becoming blood donors. Likewise, we note that a majority of our States have either enacted statutes in some form authorising tests of this nature or permit findings so obtained to be admitted in evidence. We therefore conclude that a blood test taken by a skilled technician is not
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78 AIR 1964 Bom 253
79 1 L Ed 2d 448 : 352 US 432 (1956)

such 'conduct that shocks the conscience', (*Rochin v. California*⁵⁴, US at p. 172), nor such a method of obtaining evidence that it offends a 'sense of justice', (*Brown v. Mississippi*⁸⁰, US at p. 286)."

200. In *Jamshed v. State of U.P.*⁷⁶, the following observations were made in respect of compulsory extraction of blood samples during a medical examination: (Cri LJ p. 1689, para 12)

"12. ... We are therefore of the view that there is nothing repulsive or shocking to conscience in taking the blood of the appellant in the instant case in order to establish his guilt. So far as the question of causing hurt is concerned, even causing of some pain may technically amount to hurt as defined by Section 319 of the Penal Code. But pain might be caused even if the accused is subjected to a forcible medical examination. For example, in cases of rape it may be necessary to examine the private parts of the culprit. If a culprit is suspected to have swallowed some stolen article, an emetic may be used and x-ray examination may also be necessary. For such purposes the law permits the use of necessary force. It cannot, therefore, be said that merely because some pain is caused, such a procedure should not be permitted."

201. A similar view was taken in *Ananth Kumar Naik v. State of A.P.*⁸¹, where it was held: (Cri LJ p. 1800, para 20)

"20. ... In fact Section 53 provides that while making such an examination such force as is reasonably necessary for that purpose may be used. Therefore, whatever discomfort that may be caused when samples of blood and semen are taken from an arrested person it is justified by the provisions of Sections 53 and 54 CrPC."

202. We can also refer to the following observations in *Anil Anantrao Lokhande v. State of Maharashtra*⁸²: (Cri LJ p. 138, para 30)

"30. ... Once it is held that Section 53 of the Code of Criminal Procedure does confer a right upon the investigating machinery to get the arrested persons medically examined by the medical practitioner and the expression used in Section 53 includes in its import the taking of sample of the blood for analysis, then obviously the said provision is not violative of the guarantee incorporated in Article 21 of the Constitution of India."

203. This line of precedents shows that the compelled extraction of blood samples in the course of a medical examination does not amount to "conduct that shocks the conscience". There is also an endorsement of the view that the use of "force as may be reasonably necessary" is mandated by law and hence it meets the threshold of "procedure established by law". In this light, we must restate two crucial considerations that are relevant for the case

54 96 L Ed 183 : 342 US 165 (1951)

80 80 L Ed 682 : 297 US 278 (1935)

76 1976 Cri LJ 1680 (All)

81 1977 Cri LJ 1797 (AP)

82 1981 Cri LJ 125 (Bom)

- a before us. Firstly, the restrictions placed on “personal liberty” in the course of administering the impugned techniques are not limited to physical confinement and the extraction of bodily substances. All the three techniques in question also involve testimonial responses. Secondly, most of the abovementioned cases were decided in accordance with the threshold of “procedure established by law” for restraining “personal liberty”. However, in this case we must use a broader standard of reasonableness to evaluate the validity of the techniques in question. This wider inquiry calls for deciding
- b whether they are compatible with the various judicially recognised dimensions of “personal liberty” such as the right to privacy, the right against cruel, inhuman or degrading treatment and the right to fair trial.

Applicability of the “right to privacy”

- c 204. In *Sharda v. Dharmpal*⁷¹, this Court had upheld the power of a civil court to order the medical examination of a party to a divorce proceeding. In that case, the medical examination was considered necessary for ascertaining the mental condition of one of the parties and it was held that a civil court could direct the same in the exercise of its inherent powers despite the absence of an enabling provision. In arriving at this decision it was also considered whether subjecting a person to a medical examination would violate Article 21. We must highlight the fact that a medical test for
- d ascertaining the mental condition of a person is most likely to be in the nature of a psychiatric evaluation which usually includes testimonial responses. Accordingly, a significant part of that judgment dealt with the “right to privacy”. It would be appropriate to structure the present discussion around extracts from that opinion.

- e 205. In *M.P. Sharma*⁵⁵ it had been noted that the Indian Constitution did not explicitly include a “right to privacy” in a manner akin to the Fourth Amendment of the US Constitution. In that case, this distinction was one of the reasons for upholding the validity of search warrants issued for documents required to investigate charges of misappropriation and embezzlement.

- f 206. Similar issues were discussed in *Kharak Singh v. State of U.P.*⁸³, where the Court considered the validity of the Police Regulations that authorised police personnel to maintain lists of “history-sheeters” in addition to conducting surveillance activities, domiciliary visits and periodic inquiries about such persons. The intention was to monitor persons suspected or charged with offences in the past, with the aim of preventing criminal acts in the future. At the time, there was no statutory basis for these Regulations and
- g they had been framed in the exercise of administrative functions. The majority opinion (Ayyangar, J.) held that these Regulations did not violate “personal liberty”, except for those which permitted domiciliary visits. The

h 71 (2003) 4 SCC 493

55 *M.P. Sharma v. Satish Chandra*, AIR 1954 SC 300 : 1954 Cri LJ 865 : 1954 SCR 1077

83 AIR 1963 SC 1295 : (1963) 2 Cri LJ 329

other restraints such as surveillance activities and periodic inquiries about "history-sheets" were justified by observing: (AIR p. 1303, para 20)

"20. ... the right of privacy is not a guaranteed right under our Constitution and therefore the attempt to ascertain the movements of an individual which is merely a manner in which privacy is invaded is not an infringement of a fundamental right guaranteed by Part III."

207. Ayyangar, J. distinguished between surveillance activities conducted in the routine exercise of police powers and the specific act of unauthorised intrusion into a person's home which violated "personal liberty". However, the minority opinion (Subba Rao, J.) in *Kharak Singh*⁸³ took a different approach by recognising the interrelationship between Articles 21 and 19, thereby requiring the State to demonstrate the "reasonableness" of placing such restrictions on "personal liberty". (This approach was later endorsed by Bhagwati, J. in *Maneka Gandhi v. Union of India*⁴², see AIR p. 622.) Subba Rao, J. held that the right to privacy "is an essential ingredient of personal liberty" and that the right to "personal liberty" is "a right of an individual to be free from restrictions or encroachments on his person, whether those restrictions or encroachments are directly imposed or indirectly brought about by calculated measures". (AIR at p. 1306, para 31)

208. In *Gobind v. State of M.P.*⁸⁴, the Supreme Court approved of some Police Regulations that provided for surveillance activities, but this time the decision pointed out a clear statutory basis for these Regulations. However, it was also ruled that the "right to privacy" was not an absolute right. It was held:

"28. The right to privacy in any event will necessarily have to go through a process of case-by-case development. Therefore, even assuming that the right to personal liberty, the right to move freely throughout the territory of India and the freedom of speech create an independent right of privacy as an emanation from them which one can characterise as a fundamental right, we do not think that the right is absolute. (SCC p. 157, para 28)

* * *

31. ... Assuming that the fundamental rights explicitly guaranteed to a citizen have penumbral zones and that the right to privacy is itself a fundamental right, that fundamental right must be subject to restriction on the basis of compelling public interest. (SCC p. 157, para 31)"

209. Following the judicial expansion of the idea of "personal liberty", the status of the "right to privacy" as a component of Article 21 has been recognised and reinforced. In *R. Rajagopal v. State of T.N.*⁸⁵, this Court dealt with a fact situation where a convict intended to publish his autobiography which described the involvement of some politicians and businessmen in

⁸³ *Kharak Singh v. State of U.P.*, AIR 1963 SC 1295 : (1963) 2 Cri LJ 329

⁴² (1978) 1 SCC 248

⁸⁴ (1975) 2 SCC 148 : 1975 SCC (Cri) 468

⁸⁵ (1994) 6 SCC 632

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- illegal activities. Since the publication of this work was challenged on grounds such as the invasion of privacy among others, the Court ruled on the said issue. It was held that the right to privacy could be described as the "right to be let alone and a citizen has the right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child-bearing and education among others. No one can publish anything concerning the above matters without his consent whether truthful or otherwise and whether laudatory or critical". However, it was also ruled that exceptions may be made if a person voluntarily thrusts himself into a controversy or any of these matters becomes part of public records or relates to an action of a public official concerning the discharge of his official duties.

210. In *People's Union for Civil Liberties v. Union of India*⁸⁶, it was held that the unauthorised tapping of telephones by the police personnel violated the "right to privacy" as contemplated under Article 21. However, it was not stated that telephone tapping by the police was absolutely prohibited, presumably because the same may be necessary in some circumstances to prevent criminal acts and in the course of investigation. Hence, such intrusive practices are permissible if done under a proper legislative mandate that regulates their use. This intended balance between an individual's "right to privacy" and "compelling public interest" has frequently occupied judicial attention. Such a compelling public interest can be identified with the need to prevent crimes and expedite investigations or to protect public health or morality.

211. For example, in *'X' v. Hospital 'Z'*⁸⁷, it was held that a person could not invoke his "right to privacy" to prevent a doctor from disclosing his HIV positive status to others. It was ruled that in respect of HIV positive persons, the duty of confidentiality between the doctor and patient could be compromised in order to protect the health of other individuals. With respect to the facts in that case, Saghir Ahmad, J. held: (SCC p. 307, para 29)

- ... When a patient was found to be HIV (+), its disclosure by the doctor could not be violative of either the rule of confidentiality or the patient's right of privacy as the lady with whom the patient was likely to be married was saved in time by such disclosure, or else, she too would have been infected with a dreadful disease if marriage had taken place and been consummated.

212. However, a three-Judge Bench partly overruled this decision in a review petition. In *'X' v. Hospital 'Z'*⁸⁸, it was held that if an HIV positive person contracted marriage with a willing partner, then the same would not constitute the offences defined by Sections 269 and 270 of the Penal Code. [Section 269 IPC defines the offence of a "negligent act likely to spread infection of disease dangerous to life" and Section 270 contemplates a "malignant act likely to spread infection of disease dangerous to life".]

- 86 (1997) 1 SCC 301 : AIR 1997 SC 568
87 (1998) 8 SCC 296
88 (2003) 1 SCC 500

213. A similar question was addressed by the Andhra Pradesh High Court in *M. Vijaya v. Singareni Collieries Co. Ltd.*⁸⁹: (AIR pp. 513-14, para 52)

"52. There is an apparent conflict between the right to privacy of a person suspected of HIV not to submit himself forcibly for medical examination and the power and duty of the State to identify HIV infected persons for the purpose of stopping further transmission of the virus. In the interests of the general public, it is necessary for the State to identify HIV positive cases and any action taken in that regard cannot be termed as unconstitutional as under Article 47 of the Constitution, the State was under an obligation to take all steps for the improvement of the public health. A law designed to achieve this object, if fair and reasonable, in our opinion, will not be in breach of Article 21 of the Constitution of India."

214. The discussion on the "right to privacy" in *Sharda v. Dharmapal*⁹¹ also cited a decision of the Court of Appeal (in UK) in *R.(S) v. Chief Constable of the South Yorkshire Police*⁹⁰. The contentious issues arose in respect of the retention of fingerprints and DNA samples taken from persons who had been suspected of having committed offences in the past but were not convicted for them. It was argued that this policy violated Articles 8 and 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950 (hereinafter "ECHR"). Article 8 deals with the "right to respect for private and family life" while Article 14 lays down the scope of the "prohibition of discrimination".

215. For the present discussion, it will be useful to examine the language of Article 8 of the ECHR:

"8. *Right to respect for private and family life.*—(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

216. In *South Yorkshire Police case*⁹⁰, a distinction was drawn between the "taking", "retention" and "use" of fingerprints and DNA samples. While the "taking" of such samples from individual suspects could be described as a reasonable measure in the course of routine police functions, the controversy arose with respect to the "retention" of samples taken from individuals who had been suspected of having committing offences in the past but had not been convicted for them. The statutory basis for the retention of physical samples taken from suspects was Section 64(1-A) of the Police and Criminal Evidence Act, 1984. This provision also laid down that these samples could

⁸⁹ AIR 2001 AP 502

⁷¹ (2003) 4 SCC 493

⁹⁰ (2002) 1 W.L.R. 3223 : (2003) 1 All ER 148 (CA)

- a only be used for purposes related to the “prevention or detection of crime, the investigation of an offence or the conduct of a prosecution”. This section had been amended to alter the older position which provided that physical samples taken from suspects were meant to be destroyed once the suspect was cleared of the charges or acquitted. As per the older position, it was only the physical samples taken from the convicted persons which could be retained by the police authorities. It was contended that the amended provision was incompatible with Articles 8 and 14 of the ECHR and hence
- b the relief sought was that the fingerprints and DNA samples of the parties concerned should be destroyed.

217. In response to these contentions, the majority (Lord Woolf, C.J.) held that although the retention of such material interfered with the Article 8(1) rights of the individuals (“right to respect for private and family life”) from whom it had been taken, that interference was justified by Article 8(2).
- c It was further reasoned that the purpose of the impugned amendment, the language of which was very similar to Article 8(2) was obvious and lawful. Nor were the adverse consequences to the individual disproportionate to the benefit to the public. It was held: (*South Yorkshire Police case*⁹⁰, WLR p. 3230, para 17)

- d “17. So far as the prevention and detection of crime is concerned, it is obvious the larger the databank of fingerprints and DNA samples available to the police, the greater the value of the databank will be in preventing crime and detecting those responsible for crime. There can be no doubt that if every member of the public was required to provide fingerprints and a DNA sample this would make a dramatic contribution to the prevention and detection of crime. To take but one example, the
- e great majority of rapists who are not known already to their victim would be able to be identified. However, PACE does not contain blanket provisions either as to the taking, the retention, or the use of fingerprints or samples; Parliament has decided upon a balanced approach.”

218. Lord Woolf, C.J. also referred to the following observations made by Lord Steyn in an earlier decision of the House of Lords, which was reported as *Attorney General’s Reference (No. 3 of 1999)*⁹¹, All ER at p. 584g-j; (AC p. 118 E-F)
- f

- g “... It must be borne in mind that respect for the privacy of defendants is not the only value at stake. The purpose of the criminal law is to permit everyone to go about their daily lives without fear of harm to person or property. And it is in the interests of everyone that serious crime should be effectively investigated and prosecuted. There must be fairness to all sides. In a criminal case this requires the court to consider a triangulation of interests. It involves taking into account the position of the accused, the victim and his or her family, and the public.”

- h 90 *R.(S) v. Chief Constable of the South Yorkshire Police*, (2002) 1 WLR 3223 : (2003) 1 All ER 148 (CA)
91 (2001) 2 AC 91 : (2001) 2 WLR 56 : (2001) 1 All ER 577 (HL.)

219. On the question of whether the retention of material samples collected from suspects who had not been convicted was violative of the "prohibition against discrimination" under Article 14 of the ECHR, it was observed All ER at p. 162: (*South Yorkshire Police case*⁹⁰, WLR p. 3238, para 46) a

"46. In the present circumstances when an offence is being investigated or is the subject of a charge it is accepted that fingerprints and samples may be taken. Where they have not been taken before any question of the retention arises they have to be taken so there would be the additional interference with their rights which the taking involves. As no harmful consequences will flow from the retention unless the fingerprints or sample match those of someone alleged to be responsible for an offence the different treatment is fully justified." b

220. In the present case, written submissions made on behalf of the respondents have tried to liken the compulsory administration of the impugned techniques with the DNA profiling technique. In light of this attempted analogy, we must stress that the DNA profiling technique has been expressly included among the various forms of medical examination in the amended Explanation to Section 53 CrPC. It must also be clarified that a "DNA profile" is different from a DNA sample which can be obtained from bodily substances. A DNA profile is a record created on the basis of DNA samples made available to the forensic experts. Creating and maintaining DNA profiles of offenders and suspects are useful practices since newly obtained DNA samples can be readily matched with existing profiles that are already in the possession of law-enforcement agencies. The matching of DNA samples is emerging as a vital tool for linking suspects to specific criminal acts. c

221. It may also be recalled that as per the majority decision in *Kathi Kalu Oghad*⁴⁸ the use of material samples such as fingerprints for the purpose of comparison and identification does not amount to a testimonial act for the purpose of Article 20(3). Hence, the taking and retention of DNA samples which are in the nature of physical evidence does not face constitutional hurdles in the Indian context. However, if the DNA profiling technique is further developed and used for testimonial purposes, then such uses in the future could face challenges in the judicial domain. d

222. The judgment delivered in *Sharda v. Dharmpal*⁷¹, had surveyed the abovementioned decisions to conclude that a person's right to privacy could be justifiably curtailed if it was done in light of competing interests. Reference was also made to some statutes that permitted the compulsory administration of medical tests. For instance, it was observed: (SCC p. 514, paras 61-62) e

"61. Having outlined the law relating to privacy in India, it is relevant in this context to notice that certain laws have been enacted by the Indian f

⁹⁰ *R.(S) v. Chief Constable of the South Yorkshire Police*, (2002) 1 WLR 3223 : (2003) 1 All ER 148 (CA) g

⁴⁸ *State of Bombay v. Kathi Kalu Oghad*, AIR 1961 SC 1808 : (1961) 2 Cri LJ 856 : (1962) 3 SCR 10 71 (2003) 4 SCC 493 h

Parliament where the accused may be subjected to certain medical or other tests.

a 62. By way of example, we may refer to Sections 185, 202, 203 and 204 of the Motor Vehicles Act, Sections 53 and 54 of the Code of Criminal Procedure and Section 3 of the Identification of Prisoners Act, 1920. Reference in this connection may also be made to Sections 269 and 270 of the Penal Code. Constitutionality of these laws, if challenge is thrown, may be upheld."

b 223. However, it is important for us to distinguish between the considerations that occupied this Court's attention in *Sharda v. Dharmpal*⁷¹ and the ones that we are facing in the present case. It is self-evident that the decision did not dwell on the distinction between medical tests whose results are based on testimonial responses and those tests whose results are based on the analysis of physical characteristics and bodily substances. It can be safely
c stated that the Court did not touch on the distinction between testimonial acts and physical evidence, simply because Article 20(3) is not applicable to a proceeding of a civil nature.

d 224. Moreover, a distinction must be made between the character of restraints placed on the right to privacy. While the ordinary exercise of police powers contemplates restraints of a physical nature such as the extraction of bodily substances and the use of reasonable force for subjecting a person to a medical examination, it is not viable to extend these police powers to the forcible extraction of testimonial responses. In conceptualising the "right to privacy" we must highlight the distinction between privacy in a physical sense and the privacy of one's mental processes.

e 225. So far, the judicial understanding of privacy in our country has mostly stressed on the protection of the body and physical spaces from intrusive actions by the State. While the scheme of criminal procedure as well as evidence law mandates interference with physical privacy through statutory provisions that enable arrest, detention, search and seizure among others, the same cannot be the basis for compelling a person "to impart
f personal knowledge about a relevant fact". The theory of interrelationship of rights mandates that the right against self-incrimination should also be read as a component of "personal liberty" under Article 21. Hence, our understanding of the "right to privacy" should account for its intersection with Article 20(3). Furthermore, the "rule against involuntary confessions" as embodied in Sections 24, 25, 26 and 27 of the Evidence Act, 1872 seeks to
g serve both the objectives of reliability as well as voluntariness of testimony given in a custodial setting. A conjunctive reading of Articles 20(3) and 21 of the Constitution along with the principles of evidence law leads us to a clear answer. We must recognise the importance of personal autonomy in aspects such as the choice between remaining silent and speaking. An individual's decision to make a statement is the product of a private choice and there
h should be no scope for any other individual to interfere with such autonomy,

especially in circumstances where the person faces exposure to criminal charges or penalties.

226. Therefore, it is our considered opinion that subjecting a person to the impugned techniques in an involuntary manner violates the prescribed boundaries of privacy. Forcible interference with a person's mental processes is not provided for under any statute and it most certainly comes into conflict with the "right against self-incrimination". However, this determination does not account for circumstances where a person could be subjected to any of the impugned tests but not exposed to criminal charges and the possibility of conviction. In such cases, he/she could still face adverse consequences such as custodial abuse, surveillance, undue harassment and social stigma among others. In order to address such circumstances, it is important to examine some other dimensions of Article 21.

Safeguarding the "right against cruel, inhuman or degrading treatment"

227. We will now examine whether the act of forcibly subjecting a person to any of the impugned techniques constitutes "cruel, inhuman or degrading treatment", when considered by itself. This inquiry will account for the permissibility of these techniques in all settings, including those where a person may not be subsequently prosecuted but could face adverse consequences of a non-penal nature. The appellants have contended that the use of the impugned techniques amounts to "cruel, inhuman or degrading treatment".

228. Even though the Indian Constitution does not explicitly enumerate a protection against "cruel, inhuman or degrading punishment or treatment" in a manner akin to the Eighth Amendment of the US Constitution, this Court has discussed this aspect in several cases. For example, in *Sunil Batra v. Delhi Admn.*⁶³, V.R. Krishna Iyer, J. observed: (SCC pp. 518-19, para 52)

"52. True, our Constitution has no 'due process' clause or the Eighth Amendment; but, in this branch of law, after *Cooper*⁹² and *Maneka Gandhi*⁴² the consequence is the same. For what is punitively outrageous, scandalisingly unusual or cruel and rehabilitatively counterproductive, is unarguably unreasonable and arbitrary and is shot down by Articles 14 and 19 and if inflicted with procedural unfairness, falls foul of Article 21. Part III of the Constitution does not part company with the prisoner at the gates, and judicial oversight protects the prisoner's shrunken fundamental rights, if flouted, frowned upon or frozen by the prison authority. *Is a person under death sentence or undertrial unilaterally dubbed dangerous liable to suffer extra torment too deep for tears?* Emphatically no, lest social justice, dignity of the individual, equality before the law, procedure established by law and the seven lamps of freedom (Article 19) become chimerical constitutional claptrap. Judges.

63 (1978) 4 SCC 494 : 1979 SCC (Cri) 155

92 *Rustom Cavasjee Cooper v. Union of India*, (1970) 1 SCC 248

42 *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248

- a even within a prison setting, are the real, though restricted, ombudsmen empowered to proscribe and prescribe, humanise and civilise the lifestyle within the *carcers*. The operation of Articles 14, 19 and 21 may be pared down for a prisoner but not puffed out altogether." (emphasis in original)

- b 229. In *Sunil Batra case*⁶³ this Court had disapproved of practices such as solitary confinement and the use of bar fetters in prisons. It was held that the prisoners were also entitled to "personal liberty" though in a limited sense, and hence Judges could enquire into the reasonableness of their treatment by the prison authorities. Even though "the right against cruel, inhuman and degrading punishment" cannot be asserted in an absolute sense, there is a sufficient basis to show that Article 21 can be invoked to protect the "bodily integrity and dignity" of persons who are in custodial environments. This protection extends not only to prisoners who are convicts and undertrials, but also to those persons who may be arrested or detained in the course of investigations in criminal cases.

- c 230. Judgments such as *D.K. Basu v. State of W.B.*⁹³, have stressed upon the importance of preventing the "cruel, inhuman or degrading treatment" of any person who is taken into custody. In respect of the present case, any person who is forcibly subjected to the impugned tests in the environs of a forensic laboratory or a hospital would be effectively in a custodial environment for the same. The presumption of the person being in a custodial environment will apply irrespective of whether he/she has been formally accused or is a suspect or a witness. Even if there is no overbearing police presence, the fact of physical confinement and the involuntary administration of the tests is sufficient to constitute a custodial environment for the purpose of attracting Article 20(3) and Article 21. It was necessary to clarify this aspect because we are aware of certain instances where persons are questioned in the course of investigations without being brought on the record as witnesses. Such omissions on the part of the investigating agencies should not be allowed to become a ground for denying the protections that are available to a person in custody.

- f 231. The appellants have also drawn our attention to some international conventions and declarations. For instance in the Universal Declaration of Human Rights, 1948, Article 5 states that:

"5. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

- g 232. Article 7 of the International Covenant on Civil and Political Rights, 1966 also touches on the same aspect. It reads as follows:

"7. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."

- h ⁶³ *Sunil Batra v. Delhi Admn.*, (1978) 4 SCC 494 : 1979 SCC (Cri) 155
93 (1997) 1 SCC 416 : 1997 SCC (Cri) 92 : AIR 1997 SC 610

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233. Special emphasis was placed on the definitions of "torture" as well as "cruel, inhuman or degrading treatment or punishment" in Articles 1 and 16 of the U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984. a

"Article 1

1. For the purposes of this Convention, the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions. b

2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application. c

* * *

Article 16

1. Each State party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in Articles 10, 11, 12 and 13 shall apply with the substitution for references to torture or references to other forms of cruel, inhuman or degrading treatment or punishment. d

2. The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment or which relates to extradition or expulsion." e

234. We were also alerted to the U.N. Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment, 1988 which have been adopted by the United Nations General Assembly. Principles 1, 6 and 21 hold relevance for us: f

"Principle 1

All persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person. g

* * *

Principle 6

No person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. No circumstance whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment. h

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- a The term 'cruel, inhuman or degrading treatment or punishment' should be interpreted so as to extend the widest possible protection against abuses, whether physical or mental, including the holding of a detained or imprisoned person in conditions which deprive him, temporarily or permanently, of the use of any of his natural senses, such as sight or hearing, or of his awareness of place and the passing of time.

* * *

Principle 21

- b 1. It shall be prohibited to take undue advantage of the situation of a detained or imprisoned person for the purpose of compelling him to confess, to incriminate himself otherwise or to testify against any other person.

- c 2. No detained person while being interrogated shall be subject to violence, threats or methods of interrogation which impair his capacity of decision or his judgment."

It was shown that protections against torture and "cruel, inhuman or degrading treatment or punishment" are accorded to persons who are arrested or detained in the course of armed conflicts between nations.

- d 235. In the Geneva Convention Relative to the Treatment of Prisoners of War, 1949 the relevant extract reads:

Article 17

- e ... No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind. ...

- f 236. Having surveyed these materials, it is necessary to clarify that we are not absolutely bound by the contents of the U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984 (hereinafter "the Torture Convention"). This is so because even though India is a signatory to this Convention, it has not been ratified by Parliament in the manner provided under Article 253 of the Constitution and neither do we have a national legislation which has provisions analogous to those of the Torture Convention. However, these materials do hold significant persuasive value since they represent an evolving international consensus on the nature and specific contents of human rights norms.

- g 237. The definition of "torture" indicates that the threshold for the same is the intentional infliction of physical or mental pain and suffering, by or at the instance of a public official for the purpose of extracting information or confessions. "Cruel, inhuman or degrading treatment" has been defined as conduct that does not amount to torture but is wide enough to cover all kinds of abuses. Hence, proving the occurrence of "cruel, inhuman or degrading treatment" would require a lower threshold than that of torture. In addition to highlighting these definitions, the counsel for the appellants have submitted
- h that causing physical pain by injecting a drug can amount to "injury" as

defined by Section 44 IPC or "hurt" as defined in Section 319 of the same Code.

238. In response, the counsel for the respondents have drawn our attention to the literature which suggests that in the case of the impugned techniques, the intention on part of the investigators is to extract information and not to inflict any pain or suffering. Furthermore, it has been contended that the actual administration of either the narcoanalysis technique, polygraph examination or the BEAP test does not involve a condemnable degree of "physical pain or suffering". Even though some physical force may be used or threats may be given to compel a person to undergo the tests, it was argued that the administration of these tests ordinarily does not result in physical injuries. (See Linda M. Keller, "Is Truth Serum Torture?"⁹⁴)

239. However, it is quite conceivable that the administration of any of these techniques could involve the infliction of "mental pain or suffering" and the contents of their results could expose the subject to physical abuse. When a person undergoes a narcoanalysis test, he/she is in a half-conscious state and subsequently does not remember the revelations made in a drug-induced state. In the case of polygraph examination and the BEAP test, the test subject remains fully conscious during the tests but does not immediately know the nature and implications of the results derived from the same. However, when he/she later learns about the contents of the revelations, they may prove to be incriminatory or be in the nature of testimony that can be used to prosecute other individuals. We have also highlighted the likelihood of a person making incriminatory statements when he/she is subsequently confronted with the test results. The realisation of such consequences can indeed cause "mental pain or suffering" for the person who was subjected to these tests. The test results could also support the theories or suspicions of the investigators in a particular case. These results could very well confirm suspicions about a person's involvement in a criminal act. For a person in custody, such confirmations could lead to specifically targeted behaviour such as physical abuse. In this regard, we have repeatedly expressed our concern with situations where the test results could trigger undesirable behaviour.

240. We must also contemplate situations where a threat given by the investigators to conduct any of the impugned tests could prompt a person to make incriminatory statements or to undergo some mental trauma. Especially in cases of individuals from weaker sections of society who are unaware of their fundamental rights and unable to afford legal advice, the mere apprehension of undergoing scientific tests that supposedly reveal the truth could push them to make confessional statements. Hence, the act of threatening to administer the impugned tests could also elicit testimony. It is also quite conceivable that an individual may give his/her consent to undergo the said tests on account of threats, false promises or deception by the investigators. For example, a person may be convinced to give his/her

a consent after being promised that this would lead to an early release from custody or dropping of charges. However, after the administration of the tests the investigators may renege on such promises. In such a case the relevant inquiry is not confined to the apparent voluntariness of the act of undergoing the tests, but also includes an examination of the totality of circumstances.

b 241. Such a possibility had been outlined by the National Human Rights Commission which had published "*Guidelines Relating to Administration of Polygraph Test (Lie Detector Test) on an Accused (2000)*". The relevant extract has been reproduced below:

c "... The lie detector test is much too invasive to admit of the argument that the authority for lie detector tests comes from the general power to interrogate and answer questions or make statements. (Sections 160-167 CrPC) However, in India we must proceed on the assumption of constitutional invasiveness and evidentiary impermissiveness to take the view that such holding of tests is a prerogative of the individual, not an empowerment of the police. Inasmuch as this invasive test is not authorised by law, it must perforce be regarded as illegal and unconstitutional unless it is voluntarily undertaken under non-coercive circumstances. If the police action of conducting a lie detector test is not authorised by law and impermissible, the only basis on which it could be justified is, if it is volunteered. There is a distinction between: (a) volunteering, and (b) being asked to volunteer. This distinction is of some significance in the light of the statutory and constitutional protections available to any person. There is a vast difference between a person saying, 'I wish to take a lie detector test because I wish to clear my name', and when a person is told by the police, 'If you want to clear your name, take a lie detector test.' A still worse situation would be where the police say, 'Take a lie detector test, and we will let you go.' In the first example, the person voluntarily wants to take the test. It would still have to be examined whether such volunteering was under coercive circumstances or not. In the second and third examples, the police implicitly (in the second example) and explicitly (in the third example) link up the taking of the lie detector test to allowing the accused to go free."

g 242. We can also contemplate a possibility that even when an individual freely consents to undergo the tests in question, the resulting testimony cannot be readily characterised as voluntary in nature. This is attributable to the differences between the manner in which the impugned tests are conducted and an ordinary interrogation. In an ordinary interrogation, the investigator asks questions one by one and the subject has the choice of remaining silent or answering each of these questions. This choice is repeatedly exercised after each question is asked and the subject decides the nature and content of each testimonial response. On account of the continuous exercise of such a choice, the subject's verbal responses can be described as voluntary in nature. However, in the context of the impugned techniques the test subject does not exercise such a choice in a continuous

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manner. After the initial consent is given, the subject has no conscious control over the subsequent responses given during the test. In case of the narcoanalysis technique, the subject speaks in a drug-induced state and is clearly not aware of his/her own responses at the time. In the context of polygraph examination and the BEAP tests, the subject cannot anticipate the contents of the "relevant questions" that will be asked or the "probes" that will be shown. Furthermore, the results are derived from the measurement of physiological responses and hence the subject cannot exercise an effective choice between remaining silent and imparting personal knowledge. In light of these facts, it was contended that a presumption cannot be made about the voluntariness of the test results even if the subject had given prior consent.

243. In this respect, we can re-emphasise Principles 6 and 21 of the U.N. Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment, 1988. The Explanation to Principle 6 provides that:

"The term 'cruel, inhuman or degrading treatment or punishment' should be interpreted so as to extend the widest possible protection against abuses, whether physical or mental, including the holding of a detained or imprisoned person in conditions which deprive him, temporarily or permanently, of the use of any of his natural senses, such as sight or hearing, or of his awareness of place and the passing of time."

Furthermore, Principle 21(2) lays down that:

"21. (2) No detained person while being interrogated shall be subjected to violence, threats or methods of interrogation which impair his capacity of decision or his judgment."

244. It is undeniable that during a narcoanalysis interview, the test subject does lose "awareness of place and passing of time". It is also quite evident that all the three impugned techniques can be described as methods of interrogation which impair the test subject's "capacity of decision or judgment". Going by the language of these principles, we hold that the compulsory administration of the impugned techniques constitutes "cruel, inhuman or degrading treatment" in the context of Article 21. It must be remembered that the law disapproves of involuntary testimony, irrespective of the nature and degree of coercion, threats, fraud or inducement used to elicit the same. The popular perceptions of terms such as "torture" and "cruel, inhuman or degrading treatment" are associated with gory images of blood-letting and broken bones. However, we must recognise that a forcible intrusion into a person's mental processes is also an affront to human dignity and liberty, often with grave and long-lasting consequences. [A similar conclusion has been made in the following paper: Marcy Strauss, "Criminal Defence in the Age of Terrorism—Torture"⁹⁵.]

245. It would also be wrong to sustain a comparison between the forensic uses of these techniques and the practice of medicine. It has been suggested that patients undergo a certain degree of "physical or mental pain and suffering" on account of medical interventions such as surgeries and drug

- a treatments. However, such interventions are acceptable since the objective is to ultimately cure or prevent a disease or disorder. So it is argued that if the infliction of some "pain and suffering" is permitted in the medical field, it should also be tolerated for the purpose of expediting investigations in criminal cases. This is the point where our constitutional values step in. A society governed by rules and liberal values makes a rational distinction between the various circumstances where individuals face pain and suffering. While the infliction of a certain degree of pain and suffering is mandated by law in the form of punishments for various offences, the same cannot be
- b extended to all those who are questioned during the course of an investigation. Allowing the same would vest unlimited discretion and lead to the disproportionate exercise of police powers.

Incompatibility with the "right to fair trial"

- c 246. The respondents' position is that the compulsory administration of the impugned techniques should be permitted at least for investigative purposes, and if the test results lead to the discovery of fresh evidence, then these fruits should be admissible. We have already explained in light of the conjunctive reading of Article 20(3) of the Constitution and Section 27 of the Evidence Act, that if the fact of compulsion is proved, the test results will not be admissible as evidence. However, for the sake of argument, if we were to
- d agree with the respondents and allow investigators to compel individuals to undergo these tests, it would also affect some of the key components of the "right to fair trial".

- e 247. The decision of this Court in *D.K. Basu v. State of W.B.*⁹³, had stressed upon the entitlement of a person in custody to consult a lawyer. Access to legal advice is an essential safeguard so that an individual can be adequately apprised of his constitutional and statutory rights. This is also a measure which checks custodial abuses. However, the involuntary administration of any of the impugned tests can lead to a situation where such legal advice becomes ineffective. For instance even if a person receives the best of legal advice before undergoing any of these tests, it cannot prevent the extraction of information which may prove to be inculpatory by itself or
- f lead to the subsequent discovery of incriminating materials. Since the subject has no conscious control over the drug-induced revelations or substantive inferences, the objective of providing access to legal advice are frustrated.

- g 248. Since the subject is not immediately aware of the contents of the drug-induced revelations or substantive inferences, it is also conceivable that the investigators may chose not to communicate them to the subject even after completing the tests. In fact statements may be recorded or charges framed without the knowledge of the test subject. At the stage of trial, the prosecution is obliged to supply copies of all incriminating materials to the defendant but reliance on the impugned tests could curtail the opportunity of presenting a meaningful and wholesome defence. If the contents of the revelations or inferences are communicated much later to the defendant, there
- h may not be sufficient time to prepare an adequate defence.

249. Earlier in this judgment, we had surveyed some foreign judicial precedents dealing with each of the tests in question. A common concern expressed with regard to each of these techniques was the questionable reliability of the results generated by them. In respect of the narcoanalysis technique, it was observed that there is no guarantee that the drug-induced revelations will be truthful. Furthermore, empirical studies have shown that during the hypnotic stage, individuals are prone to suggestibility and there is a good chance that false results could lead to a finding of guilt or innocence. As far as polygraph examination is concerned, though there are some studies showing improvements in the accuracy of results with advancement in technology, there is always scope for error on account of several factors. Objections can be raised about the qualifications of the examiner, the physical conditions under which the test was conducted, the manner in which questions were framed and the possible use of "countermeasures" by the test subject. A significant criticism of polygraphy is that sometimes the physiological responses triggered by feelings such as anxiety and fear could be misread as those triggered by deception. Similarly, with the P300 waves test there are inherent limitations such as the subject having had "prior exposure" to the "probes" which are used as stimuli. Furthermore, this technique has not been the focus of rigorous independent studies. The questionable scientific reliability of these techniques comes into conflict with the standard of proof "beyond reasonable doubt" which is an essential feature of criminal trials.

250. Another factor that merits attention is the role of the experts who administer these tests. While the consideration of expert opinion testimony has become a mainstay in our criminal justice system with the advancement of fields such as forensic toxicology, questions have been raised about the credibility of experts who are involved in administering the impugned techniques. It is a widely accepted principle for evaluating the validity of any scientific technique that it should have been subjected to rigorous independent studies and peer review. This is so because the persons who are involved in the invention and development of certain techniques are perceived to have an interest in their promotion. Hence, it is quite likely that such persons may give unduly favourable responses about the reliability of the techniques in question.

251. Even though India does not have a jury system, the use of the impugned techniques could impede the fact-finding role of a trial Judge. This is a special concern in our legal system, since the same Judge presides over the evidentiary phase of the trial as well as the guilt phase. The consideration of the test results or their fruits for the purpose of deciding on their admissibility could have a prejudicial effect on the Judge's mind even if the same are not eventually admitted as evidence.

252. Furthermore, we echo the concerns expressed by the Supreme Court of Canada in *R. v. Beland*¹¹, where it was observed that reliance on scientific techniques could cloud human judgment on account of an "aura of

11 (1987) 36 CCC 3d 481 : (1987) 2 SCR 398 (Can SC)

- infalibility". While Judges are expected to be impartial and objective in their evaluation of evidence, one can never discount the possibility of undue public pressure in some cases, especially when the test results appear to be inculpatory. We have already expressed concerns with situations where media organisations have either circulated the video recordings of narcoanalysis interviews or broadcasted dramatised reconstructions, especially in sensational criminal cases.

253. Another important consideration is that of ensuring parity between the procedural safeguards that are available to the prosecution and the defence. If we were to permit the compulsory administration of any of the impugned techniques at the behest of investigators, there would be no principled basis to deny the same opportunity to the defendants as well as witnesses. If the investigators could justify reliance on these techniques, there would be an equally compelling reason to allow the indiscrete administration of these tests at the request of convicts who want reopening of their cases or even for the purpose of attacking and rehabilitating the credibility of the witnesses during a trial. The decision in *United States v. Scheffer*¹⁰, has highlighted the concerns with encouraging litigation, that is, collateral to the main facts in issue. We are of the view that an untrammelled right of resorting to the techniques in question will lead to an unnecessary rise in the volume of frivolous litigation before our courts.

254. Lastly, we must consider the possibility that the victims of offences could be forcibly subjected to any of these techniques during the course of investigation. We have already highlighted a provision in the *Laboratory Procedure Manual* for polygraph tests which contemplates the same for ascertaining the testimony of victims of sexual offences. In light of the preceding discussion, it is our view that irrespective of the need to expedite investigations in such cases, no person who is a victim of an offence can be compelled to undergo any of the tests in question. Such a forcible administration would be an unjustified intrusion into mental privacy and could lead to further stigma for the victim.

Examining the "compelling public interest"

255. The respondents have contended that even if the compulsory administration of the impugned techniques amounts to a seemingly disproportionate intrusion into personal liberty, their investigative use is justifiable since there is a compelling public interest in eliciting information that could help in preventing criminal activities in the future. Such utilitarian considerations hold some significance in light of the need to combat terrorist activities, insurgencies and organised crime. It has been argued that such exigencies justify some intrusions into civil liberties. The textual basis for these restraints could be grounds such as preserving the "sovereignty and integrity of India", "the security of the State" and "public order" among others. It was suggested that if investigators are allowed to rely on these tests, the results could help in uncovering plots, apprehending suspects and

preventing armed attacks as well as the commission of offences. Reference was also made to the frequently discussed "ticking bomb" scenario. This hypothetical situation examines the choices available to investigators when they have reason to believe that the person whom they are interrogating is aware of the location of a bomb. The dilemma is whether it is justifiable to use torture or other improper means for eliciting information which could help in saving the lives of ordinary citizens. [The arguments for the use of "truth serums" in such situations have been examined in the following articles: Jason R. Odeshoo, "Truth or Dare?: Terrorism and Truth Serum in the Post-9/11 World"⁹⁶, Kenneth Lasson, "Torture, Truth Serum, and Ticking Bombs: Toward a Pragmatic Perspective on Coercive Interrogation"⁹⁷.]

256. While these arguments merit consideration, it must be noted that ordinarily it is the task of the legislature to arrive at a pragmatic balance between the often competing interests of "personal liberty" and "public safety". In our capacity as a constitutional court, we can only seek to preserve the balance between these competing interests as reflected in the text of the Constitution and its subsequent interpretation. There is absolutely no ambiguity on the status of principles such as the "right against self-incrimination" and the various dimensions of "personal liberty": We have already pointed out that the rights guaranteed in Articles 20 and 21 of the Constitution of India have been given a non-derogable status and they are available to citizens as well as foreigners. It is not within the competence of the judiciary to create exceptions and limitations on the availability of these rights.

257. Even though the main task of constitutional adjudication is to safeguard the core organising principles of our polity, we must also highlight some practical concerns that strengthen the case against the involuntary administration of the tests in question. Firstly, the claim that the results obtained from these techniques will help in extraordinary situations is questionable. All of the tests in question are those which need to be patiently administered and the forensic psychologist or the examiner has to be very skilful and thorough while interpreting the results. In a narcoanalysis test the subject is likely to divulge a lot of irrelevant and incoherent information. The subject is as likely to divulge false information as he/she is likely to reveal useful facts. Sometimes the revelations may begin to make sense only when compared with the testimony of several other individuals or through the discovery of fresh materials. In a polygraph test, interpreting the results is a complex process that involves accounting for distortions such as "countermeasures" used by the subject and weather conditions among others. In a BEAP test, there is always the possibility of the subject having had prior exposure to the "probes" that are used as stimuli. All of this is a gradually unfolding process and it is not appropriate to argue that the test results will always prove to be crucial in times of exigency. It is evident that both the

⁹⁶ 57 Stanford Law Review 209-255 (October 2004)

⁹⁷ 39 Loyola University Chicago Law Journal 329- 360 (Winter 2008)

tasks of preparing for these tests and interpreting their results need considerable time and expertise.

- a 258. Secondly, if we were to permit the forcible administration of these techniques, it could be the first step on a very slippery slope as far as the standards of police behaviour are concerned. In some of the impugned judgments, it has been suggested that the promotion of these techniques could reduce the regrettably high incidence of "third-degree methods" that are being used by policemen all over the country. This is a circular line of reasoning since one form of improper behaviour is sought to be replaced by another. What this will result in is that investigators will increasingly seek reliance on the impugned techniques rather than engaging in a thorough investigation. The widespread use of "third-degree" interrogation methods so as to speak is a separate problem and needs to be tackled through long-term solutions such as more emphasis on the protection of human rights during
- b police training, providing adequate resources for investigators and stronger accountability measures when such abuses do take place.
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259. Thirdly, the claim that the use of these techniques will only be sought in cases involving heinous offences rings hollow since there will no principled basis for restricting their use once the investigators are given the discretion to do so. From the statistics presented before us as well as the charges filed against the parties in the impugned judgments, it is obvious that investigators have sought reliance on the impugned tests to expedite investigations, unmindful of the nature of offences involved. In this regard, we do not have the authority to permit the qualified use of these techniques by way of enumerating the offences which warrant their use. By itself, permitting such qualified use would amount to a law-making function which
- d
- e is clearly outside the judicial domain.

260. One of the main functions of constitutionally prescribed rights is to safeguard the interests of citizens in their interactions with the Government. As the guardians of these rights, we will be failing in our duty if we permit any citizen to be forcibly subjected to the tests in question. One could argue that some of the parties who will benefit from this decision are hardened criminals who have no regard for societal values. However, it must be borne in mind that in constitutional adjudication our concerns are not confined to the facts at hand but extend to the implications of our decision for the whole population as well as the future generations.
- f

261. Sometimes there are apprehensions about Judges imposing their personal sensibilities through broadly worded terms such as "substantive due process", but in this case our inquiry has been based on a faithful understanding of principles entrenched in our Constitution. In this context it would be useful to refer to some observations made by the Supreme Court of Israel in *Public Committee Against Torture in Israel v. State of Israel*⁹⁸, where it was held that the use of physical means (such as shaking the suspect, sleep deprivation and enforcing uncomfortable positions for prolonged
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periods) during interrogation of terrorism suspects was illegal. Among other questions raised in that case, it was also held that the "necessity" defence could be used only as a post-factum justification for past conduct and that it could not be the basis of a blanket pre-emptive permission for coercive interrogation practices in the future. Ruling against such methods, Aharon Barak, J. held at p. 26:

"... This is the destiny of democracy, as not all means are acceptable to it, and not all practices employed by its enemies are open before it. Although a democracy must often fight with one hand tied behind its back, it nonetheless has the upper hand. Preserving the 'rule of law' and recognition of an individual's liberty constitutes an important component in its understanding of security."

Conclusion

262. In our considered opinion, the compulsory administration of the impugned techniques violates the "right against self-incrimination". This is because the underlying rationale of the said right is to ensure the reliability as well as voluntariness of statements that are admitted as evidence. This Court has recognised that the protective scope of Article 20(3) extends to the investigative stage in criminal cases and when read with Section 161(2) of the Code of Criminal Procedure, 1973 it protects accused persons, suspects as well as witnesses who are examined during an investigation. The test results cannot be admitted in evidence if they have been obtained through the use of compulsion. Article 20(3) protects an individual's choice between speaking and remaining silent, irrespective of whether the subsequent testimony proves to be inculpatory or exculpatory. Article 20(3) aims to prevent the forcible "conveyance of personal knowledge that is relevant to the facts in issue". The results obtained from each of the impugned tests bear a "testimonial" character and they cannot be categorised as material evidence.

263. We are also of the view that forcing an individual to undergo any of the impugned techniques violates the standard of "substantive due process" which is required for restraining personal liberty. Such a violation will occur irrespective of whether these techniques are forcibly administered during the course of an investigation or for any other purpose since the test results could also expose a person to adverse consequences of a non-penal nature. The impugned techniques cannot be read into the statutory provisions which enable medical examination during investigation in criminal cases i.e. the Explanation to Sections 53, 53-A and 54 of the Code of Criminal Procedure, 1973. Such an expansive interpretation is not feasible in light of the rule of "ejusdem generis" and the considerations which govern the interpretation of statutes in relation to scientific advancements. We have also elaborated how the compulsory administration of any of these techniques is an unjustified intrusion into the mental privacy of an individual. It would also amount to "cruel, inhuman or degrading treatment" with regard to the language of evolving international human rights norms. Furthermore, placing reliance on the results gathered from these techniques comes into conflict with the "right

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to fair trial". Invocations of a compelling public interest cannot justify the dilution of constitutional rights such as the "right against self-incrimination".

- a 264. In light of these conclusions, we hold that no individual should be forcibly subjected to any of the techniques in question, whether in the context of investigation in criminal cases or otherwise. Doing so would amount to an unwarranted intrusion into personal liberty. However, we do leave room for the voluntary administration of the impugned techniques in the context of criminal justice provided that certain safeguards are in place. Even when the
- b subject has given consent to undergo any of these tests, the test results by themselves cannot be admitted as evidence because the subject does not exercise conscious control over the responses during the administration of the test. However, any information or material that is subsequently discovered with the help of voluntary administered test results can be admitted in accordance with Section 27 of the Evidence Act, 1872.

- c 265. The National Human Rights Commission had published *Guidelines for the Administration of Polygraph Test (Lie Detector Test) on an Accused* in 2000. These Guidelines should be strictly adhered to and similar safeguards should be adopted for conducting the "narcoanalysis technique" and the "Brain Electrical Activation Profile" test. The text of these Guidelines has been reproduced below:

- d (i) No lie detector tests should be administered except on the basis of consent of the accused. An option should be given to the accused whether he wishes to avail such test.

- e (ii) If the accused volunteers for a lie detector test, he should be given access to a lawyer and the physical, emotional and legal implication of such a test should be explained to him by the police and his lawyer.

- (iii) The consent should be recorded before a Judicial Magistrate.

- (iv) During the hearing before the Magistrate, the person alleged to have agreed should be duly represented by a lawyer.

- f (v) At the hearing, the person in question should also be told in clear terms that the statement that is made shall not be a "confessional" statement to the Magistrate but will have the status of a statement made to the police.

- (vi) The Magistrate shall consider all factors relating to the detention including the length of detention and the nature of the interrogation.

- g (vii) The actual recording of the lie detector test shall be done by an independent agency (such as a hospital) and conducted in the presence of a lawyer.

- (viii) A full medical and factual narration of the manner of the information received must be taken on record.

266. The present batch of appeals is disposed of accordingly.

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(1994) 6 Supreme Court Cases 632

(BEFORE B.P. JEEVAN REDDY AND SUHAS C. SEN, JJ.)

R. RAJAGOPAL ALIAS R.R. GOPAL AND ANOTHER

Petitioners;

Versus

STATE OF T.N. AND OTHERS

Respondents.

Writ Petition (C) No. 422 of 1994†, decided on October 7, 1994

Constitution of India — Arts. 21 and 19(1)(a) & 2 — Right of privacy vis-a-vis freedom of Press — Proper balancing between the two necessary — Publication of life story or biography of a citizen exposing misdeeds of some public officials — Remedies available in case of infringement of right of privacy — Right of privacy — Held, implicit in Art. 21 — Broad principles laid down; further development to be case-by-case — Publication of any matter concerning privacy of a citizen's own as well as of his family, marriage, procreation, motherhood, child-bearing, education etc. without his/her consent would entitle him/her to damages, except where the publication is based on public records including court records, provided it does not pertain to any female victim of sexual assault, kidnap, abduction etc. — However, publication relating to acts or conduct of public officials in discharge of their official duty, unless shown to have been made in reckless disregard for truth, would not entitle the officials to invoke right of privacy and claim damages — Nor the Govt., local authority and other organs and institutions exercising governmental powers entitled to sue for damages — Nor can the Govt. or its officials impose any prior restraint on publication of the matter in question — Relevance of English and American cases — Impact of Arts. 19(1)(a) and (2) on Ss. 499 and 500, IPC not considered — Tort Law — IPC, 1860, Ss. 499 and 500

The first petitioner is the editor, printer and publisher of a Tamil weekly magazine published from Madras and the second petitioner is the associate editor of the weekly. According to them one Auto Shankar (AS for short), who was convicted for six murders and was sentenced to death, had written his autobiography in jail and had handed over the same to his wife with the knowledge and approval of the jail authorities for being delivered to his advocate with the request to publish the same in the petitioners' magazine. The autobiography depicted the close nexus between the prisoner and several IAS, IPS and other officers, some of whom were his partners in several crimes. The petitioners decided to commence serial publication of the autobiography and announced the same in their magazine. Thereupon the Inspector General of Prisons wrote a letter to the first petitioner alleging that the serial in question was not written by AS and asking him to stop publishing the same forthwith. The petitioners then filed writ petition under Article 32 before the Supreme Court to challenge the letter and asserting the freedom of press and their right to publish the book. Neither AS nor his wife were made parties to the writ petition.

On the pleadings in this petition, the following questions arose:

(1) Whether a citizen of this country can prevent another person from writing his life story or biography? Does such unauthorised writing infringe the citizen's right to privacy? Whether the freedom of press guaranteed by Article 19(1)(a) entitles the press to publish such unauthorised account of a citizen's

† Under Article 32 of the Constitution of India

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- life and activities and if so to what extent and in what circumstances? What are the remedies open to a citizen of this country in case of infringement of his right to privacy and further in case such writing amounts to defamation?
- a (2)(a) Whether the Government can maintain an action for its defamation?
- (b) Whether the Government has any legal authority to impose prior restraint on the press to prevent publication of material defamatory of its officials? and
- (c) Whether the public officials, who apprehend that they or their colleagues may be defamed, can impose a prior restraint upon the press to prevent such publication?
- b (3) Whether the prison officials can prevent the publication of the life story of a prisoner on the ground that the prisoner being incarcerated and thus not being in a position to adopt legal remedies to protect his rights, they are entitled to act on his behalf?
- Allowing the writ petition
- c Held :
- The petitioners have a right to publish, what they allege to be the life story/autobiography of AS insofar as it appears from the public records, even without his consent or authorisation. But if they go beyond that and publish his life story, they may be invading his right to privacy and will be liable for the consequences in accordance with law. Similarly, neither the Government nor the officials who apprehend that they may be defamed, have the right to impose a prior restraint upon the publication of the alleged autobiography of AS. The remedy of public officials/public figures, if any, will arise only after the publication and will be governed by the principles indicated herein. However, no opinion need be expressed about the right of the State or its officials to prosecute the petitioners under Sections 499/500 IPC. This is for the reason that even if they are entitled to do so, there is no law under which they can prevent the publication of a material on the ground that such material is likely to be defamatory of them.
- d (Paras 29, 22 and 23)
- e *New York Times v. United States*, 403 US 713 : 29 L Ed 2d 822 (1971), approved
- It is not stated in the counter-affidavit that AS had requested or authorised the prison officials or the Inspector General of Prisons, as the case may be, to adopt appropriate proceedings to protect his right to privacy. If so, the respondents cannot take upon themselves the obligation of protecting his right to privacy. No prison rule was brought to the Court's notice which empowers the prison officials to do so. Moreover, the occasion for any such action arises only after the publication and not before.
- f (Para 24)
- The right to privacy as an independent and distinctive concept originated in the field of Tort law, under which a new cause of action for damages resulting from unlawful invasion of privacy was recognised. This right has two aspects which are but two faces of the same coin — (1) the general law of privacy which affords a tort action for damages resulting from an unlawful invasion of privacy and (2) the constitutional recognition given to the right to privacy which protects personal privacy against unlawful governmental invasion. The first aspect of this right must be said to have been violated where, for example, a person's name or likeness is used, without his consent, for advertising — or non-advertising — purposes or for that matter, his life story is written — whether laudatory or otherwise — and published without his consent. In recent times, however, this right has acquired a constitutional status.
- g (Para 9)
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The freedom of speech flows from the freedom of speech and expression guaranteed by Article 19(1)(a). But the said right is subject to reasonable restrictions placed thereon by an existing law or a law made after the commencement of the Constitution in the interests of or in relation to the several matters set out therein. Decency and defamation are two of the grounds mentioned in clause (2). Law of torts providing for damages for invasion of the right to privacy and defamation and Sections 499/500 IPC are the existing laws saved under clause (2). But what is called for today — in the present times — is a proper balancing of the freedom of press and said laws consistent with the democratic way of life ordained by the Constitution. Over the last few decades, press and electronic media have emerged as major factors in our nation's life. They are still expanding — and in the process becoming more inquisitive. Our system of Government demands — as do the systems of Government of the United States of America and United Kingdom — constant vigilance over exercise of governmental power by the press and the media among others. It is essential for a good Government. At the same time, it must be remembered that our society may not share the degree of public awareness obtaining in United Kingdom or United States. The sweep of the First Amendment to the United States Constitution and the freedom of speech and expression under our Constitution is not identical though similar in their major premises. All this may call for some modification of the principles emerging from the English and United States decisions in their application to our legal system.

(Para 21)

Following broad principles are evolved keeping in mind the above considerations :

(1) The right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by Article 21. It is a "right to be let alone". A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child-bearing and education among other matters. None can publish anything concerning the above matters without his consent — whether truthful or otherwise and whether laudatory or critical. If he does so, he would be violating the right to privacy of the person concerned and would be liable in an action for damages. Position may, however, be different, if a person voluntarily thrusts himself into controversy or voluntarily invites or raises a controversy.

(2) The rule aforesaid is subject to the exception, that any publication concerning the aforesaid aspects becomes unobjectionable if such publication is based upon public records including court records. This is for the reason that once a matter becomes a matter of public record, the right to privacy no longer subsists and it becomes a legitimate subject for comment by press and media among others. We are, however, of the opinion that in the interests of decency [Article 19(2)] an exception must be carved out to this rule, viz., a female who is the victim of a sexual assault, kidnap, abduction or a like offence should not further be subjected to the indignity of her name and the incident being publicised in press/media.

(3) There is yet another exception to the rule in (1) above — indeed, this is not an exception but an independent rule. In the case of public officials, it is obvious, right to privacy, or for that matter, the remedy of action for damages is simply not available with respect to their acts and conduct relevant to the discharge of their official duties. This is so even where the publication is based upon facts and statements which are not true, unless the official establishes that the publication was made (by the defendant) with reckless disregard for truth. In such a case, it would be enough for the defendant (member of the press or

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a media) to prove that he acted after a reasonable verification of the facts; it is not necessary for him to prove that what he has written is true. Of course, where the publication is proved to be false and actuated by malice or personal animosity, the defendant would have no defence and would be liable for damages. It is equally obvious that in matters not relevant to the discharge of his duties, the public official enjoys the same protection as any other citizen, as explained in (1) and (2) above. It needs no reiteration that judiciary, which is protected by the power to punish for contempt of court and Parliament and legislatures protected as their privileges are by Articles 105 and 104 respectively of the Constitution of India, represent exceptions to this rule.

b (4) So far as the Government, local authority and other organs and institutions exercising governmental power are concerned, they cannot maintain a suit for damages for defaming them.

(5) Rules 3 and 4 do not, however, mean that Official Secrets Act, 1923, or any similar enactment or provision having the force of law does not bind the press or media.

c (6) There is no law empowering the State or its officials to prohibit, or to impose a prior restraint upon the press/media. (Para 26)

d *Kharak Singh v. State of U.P.*, (1964) 1 SCR 332 : AIR 1963 SC 1295 : (1963) 2 Cri LJ 329; *Gobind v. State of M.P.*, (1975) 2 SCC 148 : 1975 SCC (Cri) 468; *Olmstead v. United States*, 277 US 438 : 72 L Ed 944 (1927); *Time, Inc. v. Hill*, 385 US 374 : 17 L Ed 2d 456 (1967); *New York Times v. Sullivan*, 376 US 254 : 11 L Ed 2d 686 (1964); *Griswold v. Connecticut*, 381 US 479 : 14 L Ed 2d 510 (1965); *Cox Broadcasting Corp v. Cohn*, 420 US 469 : 43 L Ed 2d 328 (1975); *Roe v. Wade*, 410 US 113 : 35 L Ed 2d 147 (1973); *Planned Parenthood v. Casey*, 120 L Ed 2d 683 (1992); *Derbyshire County Council v. Times Newspapers Ltd.*, (1993) 2 WLR 449 : (1993) 1 All ER 1011, HL; *Attorney General v. Guardian Newspapers Ltd (No. 2)*, (1990) 1 AC 109 : (1988) 3 All ER 545 : (1988) 3 WLR 776, HL; *Leonard Hector v. Attorney General of Antigua and Barbuda*, (1990) 2 AC 312 : (1990) 2 All ER 103 : (1990) 2 WLR 606, PC, considered

e *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale LJ 920; 26 Stanford Law Rev. 1161; *Privacy and Human Rights*, Ed. AH Robertson, p. 176; *NAACP v. Alabama*, 377 US 288 : 12 L Ed 2d 325 (1964); *Palko v. Connecticut*, 302 US 319; 82 L Ed 288 (1937); *Loving v. Virginia*, 388 US 1 : 18 L Ed 2d 1010 (1967); *Skinner v. Oklahoma*, 316 US 535 : 86 L Ed 1655 (1942); *Eisenstadt v. Baird*, 405 US 438 : 31 L Ed 2d 349 (1972); *Prince v. Massachusetts*, 321 US 158 : 88 L Ed 645 (1944); *Pierce v. Society of Sisters*, 268 US 510 : 69 L Ed 1070 (1925); *Meyer v. Nebraska*, 262 US 390 : 67 L Ed 1042 (1923), cited

f The principles above mentioned are only the broad principles. They are neither exhaustive nor all-comprehending; indeed no such enunciation is possible or advisable. This right has to go through a case-by-case development. The concepts dealt with herein are still in the process of evolution. However, the impact of Article 19(1)(a) read with clause (2) thereof on Sections 499 and 500 of Indian Penal Code has not been gone into here. That may have to await a proper case.

g (Paras 27 and 28)
R-M/T/13620/C

Advocates who appeared in this case :

B.D. Sharma, Advocate, for the Petitioners;

A. Maniarpuram and Ms Aruna Mathur, Advocates, for the Respondents.

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The Judgment of the Court was delivered by

B.P. JEEVAN REDDY, J.— This petition raises a question concerning the freedom of press vis-à-vis the right to privacy of the citizens of this country. It also raises the question as to the parameters of the right of the press to criticise and comment on the acts and conduct of public officials.

2. The first petitioner is the editor, printer and publisher of a Tamil weekly magazine *Nakkheeran*, published from Madras. The second petitioner is the associate editor of the magazine. They are seeking issuance of an appropriate writ, order or direction under Article 32 of the Constitution, restraining the respondents, viz., (1) State of Tamil Nadu represented by the Secretary, Home Department, (2) Inspector General of Prisons, Madras and (3) Superintendent of Prisons (Central Prison), Salem, Tamil Nadu from taking any action as contemplated in the second respondent's communication dated 15-6-1994 and further restraining them from interfering with the publication of the autobiography of the condemned prisoner, Auto Shankar, in their magazine. Certain other reliefs are prayed for in the writ petition but they are not pressed before us.

3. Shankar @ Gauri Shankar @ Auto Shankar was charged and tried for as many as six murders. He was convicted and sentenced to death by the learned Sessions Judge, Chenglepat on 31-5-1991 which was confirmed by the Madras High Court on 17-7-1992. His appeal to this Court was dismissed on 5-4-1994. It is stated that his mercy petition to the President of India is pending consideration.

4. The petitioners have come forward with the following case: Auto Shankar wrote his autobiography running into 300 pages while confined in Chenglepat sub-jail during the year 1991. The autobiography was handed over by him to his wife, Smt Jagdishwari, with the knowledge and approval of the jail authorities, for being delivered to his advocate, Shri Chandrasekharan. The prisoner requested his advocate to ensure that his autobiography is published in the petitioners' magazine, *Nakkheeran*. The petitioners agreed to the same. Auto Shankar affirmed this desire in several letters written to his advocate and the first petitioner. The autobiography sets out the close nexus between the prisoner and several IAS, IPS and other officers, some of whom were indeed his partners in several crimes. The presence of several such officers at the house-warming ceremony of Auto Shankar's house is proved by the video cassette and several photographs taken on the occasion. Before commencing the serial publication of the autobiography in their magazine, the petitioners announced in the issue dated 21-5-1994 that very soon the magazine would be coming out with the sensational life history of Auto Shankar. This announcement sent shock waves among several police and prison officials who were afraid that their links with the condemned prisoner would be exposed. They forced the said prisoner, by applying third degree methods, to write letters addressed to the second respondent (Inspector General of Prisons) and the first petitioner requesting that his life story should not be published in the magazine.

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- a Certain correspondence ensued between the petitioners and the prison authorities in this connection. Ultimately, the Inspector General of Prisons (R-2) wrote the impugned letter dated 15-6-1994 to the first petitioner. The letter states that the petitioner's assertion that Auto Shankar had written his autobiography while confined in jail in the year 1991 is false. It is equally false that the said autobiography was handed over by the said prisoner to his wife with the knowledge and approval of the prison authorities. The prisoner has himself denied the writing of any such book. It is equally false that any
- b power of attorney was executed by the said prisoner in favour of his advocate, Shri Chandrasekharan in connection with the publication of the alleged book. If a prisoner has to execute a power of attorney in favour of another, it has to be done in the presence of the prison officials as required by the prison rules; the prison records do not bear out execution of any such power of attorney. The letter concludes:
- c "From the above facts, it is clearly established that the serial in your magazine under the caption 'Shadowed Truth' or 'Auto Shankar's dying declaration' is not really written by Gauri Shankar but it is written by someone else in his name. Writing an article in a magazine in the name of a condemned prisoner is against prison rules and your claim that the power of attorney is given by the prisoner is unlawful. In view of all
- d those it is alleged that your serial supposed to have written by Auto Shankar is (false?) since with an ulterior motive for this above act there will arise a situation that we may take legal action against you for blackmailing. Hence, I request you to stop publishing the said serial forthwith."
- e 5. The petitioners submit that the contents of the impugned letter are untrue. The argument of jeopardy to prisoner's interest is a hollow one. The petitioners have a right to publish the said book in their magazine as desired by the prisoner himself. Indeed, the petitioners have published parts of the said autobiography in three issues of their magazine dated 11-6-1994, 18-6-1994 and 22-6-1994 but stopped further publication in view of the threatening tone of the letter dated 15-6-1994. The petitioners have reasons
- f to believe that the police authorities may swoop down upon their printing press, seize the issues of the magazine besides damaging the press and their properties, with a view to terrorise them. On a previous occasion when the petitioners' magazine published, on 16-8-1991, an investigative report of tapping of telephones of opposition leaders by the State Government, the then editor and publisher were arrested, paraded, jailed and subjected to the
- g third degree methods. There have been several instances when the petitioners' press was raided and substantial damage done to their press and properties. The petitioners are apprehensive that the police officials may again do the same since they are afraid of their links with the condemned prisoner being exposed by the publication of the said autobiography. The petitioners assert the freedom of press guaranteed by Article 19(1)(a), which,
- h according to them, entitles them to publish the said autobiography. It is submitted that the condemned prisoner has also the undoubted right to have

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his life story published and that he cannot be prevented from doing so. It is also stated in the writ petition that before approaching this Court by way of this writ petition, they had approached the Madras High Court for similar reliefs but that the office of the High Court had raised certain objections to the maintainability of the writ petition. A learned Single Judge of the High Court, it is stated, heard the petitioners in connection with the said objections but no orders were passed thereon till the filing of the writ petition.

6. Respondents 2 and 3 have filed a counter-affidavit, sworn to by Shri T.S. Panchapakesan, Inspector General of Prisons, State of Tamil Nadu. At the outset, it is submitted that the writ petition filed by the petitioners in the High Court was dismissed by the learned Single Judge on 28-6-1994 holding inter alia that the question whether the said prisoner had indeed written his autobiography and authorised the petitioners to publish the same is a disputed question of fact. This was so held in view of the failure of the learned counsel for the petitioners to produce the alleged letters written by the prisoner to his counsel, or to the petitioners, authorising them to publish his autobiography. It is submitted that the letter dated 15-6-1994 was addressed to the first petitioner inasmuch as "there was a genuine doubt regarding the authorship of the autobiography alleged to have been written by the condemned prisoner while he was in prison and which purportedly reached his wife. Besides, it was also not clear whether the said prisoner had as a matter of fact authorised the petitioner to publish the said autobiography. In the context of such a disputed claim both as to authenticity as well as the authority to publish the said autobiography, the said communication was addressed to the petitioners herein, since the petitioners have threatened to publish derogatory and scurrilous statements purporting to (be?) based on material which are to be found in the disputed autobiography." It is submitted that the allegation that a number of IAS, IPS and other officers patronised the condemned prisoner in his nefarious activities is baseless. "It is only in the context of such a situation coupled with the fact that the petitioner might under the guise of such an autobiography tarnish the image of the persons holding responsible positions in public institution that the communication dated 15-6-1994 was sent to him", say the respondents. They also denied that they subjected the said prisoner to third degree methods to pressurise him into writing letters denying the authorisation to the petitioners to publish his life story.

7. Neither Auto Shankar nor his wife — nor his counsel — are made parties to this writ petition. We do not have their version on the disputed question of fact, viz., whether Auto Shankar has indeed written his autobiography and/or whether he had requested or authorised the petitioners to publish the same in their magazine. In this writ petition under Article 32 of the Constitution, we cannot go into such a disputed question of fact. We shall, therefore, proceed on the assumption that the said prisoner has neither written his autobiography nor has he authorised the petitioners to publish the same in their magazine, as asserted by the writ petitioners. We must,

however, make it clear that ours is only an assumption for the purpose of this writ petition and not a finding of fact. The said disputed question may have to be gone into, as and when necessary, before an appropriate court or forum, as the case may be.

8. On the pleadings in this petition, following questions arise:

(1) Whether a citizen of this country can prevent another person from writing his life story or biography? Does such unauthorised writing infringe the citizen's right to privacy? Whether the freedom of press guaranteed by Article 19(1)(a) entitles the press to publish such unauthorised account of a citizen's life and activities and if so to what extent and in what circumstances? What are the remedies open to a citizen of this country in case of infringement of his right to privacy and further in case such writing amounts to defamation?

(2)(a) Whether the Government can maintain an action for its defamation?

(b) Whether the Government has any legal authority to impose prior restraint on the press to prevent publication of material defamatory of its officials? and

(c) Whether the public officials, who apprehend that they or their colleagues may be defamed, can impose a prior restraint upon the press to prevent such publication?

(3) Whether the prison officials can prevent the publication of the life story of a prisoner on the ground that the prisoner being incarcerated and thus not being in a position to adopt legal remedies to protect his rights, they are entitled to act on his behalf?

e Question Nos. 1 and 2

9. The right to privacy as an independent and distinctive concept originated in the field of Tort law, under which a new cause of action for damages resulting from unlawful invasion of privacy was recognised. This right has two aspects which are but two faces of the same coin — (1) the general law of privacy which affords a tort action for damages resulting from an unlawful invasion of privacy and (2) the constitutional recognition given to the right to privacy which protects personal privacy against unlawful governmental invasion. The first aspect of this right must be said to have been violated where, for example, a person's name or likeness is used, without his consent, for advertising — or non-advertising — purposes or for that matter, his life story is written — whether laudatory or otherwise — and published without his consent as explained hereinafter. In recent times, however, this right has acquired a constitutional status. We shall proceed to explain how? Right to privacy is not enumerated as a fundamental right in our Constitution but has been inferred from Article 21. The first decision of this Court dealing with this aspect is *Kharak Singh v. State of U.P.*¹ A more elaborate appraisal of this right took place in a later decision in *Gobind v.*

¹ (1964) 1 SCR 332 · AIR 1963 SC 1295 : (1963) 2 Cri LJ 329

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*State of M.P.*² wherein Mathew, J. speaking for himself, Krishna Iyer and Goswami, JJ. traced the origins of this right and also pointed out how the said right has been dealt with by the United States Supreme Court in two of its well-known decisions in *Griswold v. Connecticut*³ and *Roe v. Wade*⁴. After referring to *Kharak Singh*¹ and the said American decisions, the learned Judge stated the law in the following words: (SCC pp. 155-57, paras 22-29)

"... privacy-dignity claims deserve to be examined with care and to be denied only when an important countervailing interest is shown to be superior. If the Court does find that a claimed right is entitled to protection as a fundamental privacy right, a law infringing it must satisfy the compelling State interest test.

* * *

privacy primarily concerns the individual. It therefore relates to and overlaps with the concept of liberty. The most serious advocate of privacy must confess that there are serious problems of defining the essence and scope of the right. Privacy interest in autonomy must also be placed in the context of other rights and values.

Any right to privacy must encompass and protect the personal intimacies of the home, the family, marriage, motherhood, procreation and child-rearing. This catalogue approach to the question is obviously not as instructive as it does not give analytical picture of the distinctive characteristics of the right of privacy. Perhaps, the only suggestion that can be offered as unifying principle underlying the concept has been the assertion that a claimed right must be a fundamental right implicit in the concept of ordered liberty.

* * *

As Ely says:

There is nothing to prevent one from using the word 'privacy' to mean the freedom to live one's life without governmental interference. But the Court obviously does not so use the term. Nor could it, for such a right is at stake in every case.⁵

There are two possible theories for protecting privacy of home. The first is that activities in the home harm others only to the extent that they cause offence resulting from the mere thought that individuals might be engaging in such activities and that such 'harm' is not constitutionally protectible by the State. The second is that individuals need a place of sanctuary where they can be free from societal control. The importance of such a sanctuary is that individuals can drop the mask, desist for a while from projecting on the world the image they want to be accepted

² (1975) 2 SCC 148 1975 SCC (Cr) 468

³ 381 US 479 14 L Ed 2d 510 (1965)

⁴ 410 US 113 35 L Ed 2d 147 (1973)

⁵ See *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale LJ 920, 932

as themselves, an image that may reflect the values of their peers rather than the realities of their natures.⁶

a The right to privacy in any event will necessarily have to go through a process of case-by-case development. Therefore, even assuming that the right to personal liberty, the right to move freely throughout the territory of India and the freedom of speech create an independent right of privacy as an emanation from them which one can characterize as a fundamental right, we do not think that the right is absolute.

b The European Convention on Human Rights, which came into force on 3-9-1953, represents a valiant attempt to tackle the new problem. Article 8 of the Convention is worth citing⁷:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others."

d Since the right to privacy has been the subject-matter of several decisions in the United States, it would be appropriate to briefly refer to some of the important decisions in that country.

e 10. The right to privacy was first referred to as a right and elaborated in the celebrated article of Warren and Brandies (later Mr Justice Brandies) entitled "*The right to privacy*" published in 4 Harvard Law Review 193, in the year 1890.

f 11. Though the expression "right to privacy" was first referred to in *Olmstead v. United States*⁸, it came to be fully discussed in *Time, Inc. v. Hill*⁹. The facts of the case are these: On a particular day in the year 1952, three escaped convicts intruded into the house of James Hill and held him and members of his family hostage for nineteen hours, whereafter they released them unharmed. The police immediately went after the culprits, two of whom were shot dead. The incident became prime news in the local newspapers and the members of the press started swarming the Hill's home for an account of what happened during the hold-up. The case of the family was that they were not ill-treated by the intruders but the members of the press were not impressed. Unable to stop the siege of the press correspondents, the family shifted to a far-away place. *Life* magazine sent its men to the former home of Hill family where they re-enacted the entire incident, and photographed it, showing inter alia that the members of the

6 See 26 Stanford Law Rev. 1161, 1187

7 See *Privacy and Human Rights*, Ed. AH Robertson, p. 176

8 277 US 438 : 72 L Ed 944 (1927)

9 385 US 374 : 17 L Ed 2d 456 (1967)

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family were ill-treated by the intruders. When *Life* published the story, Hill brought a suit against Time Inc., publishers of *Life* magazine, for invasion of his privacy. The New York Supreme Court found that the whole story was "a piece of commercial fiction" — and not a true depiction of the event — and accordingly confirmed the award of damages. However, when the matter was taken to United States Supreme Court, it applied the rule evolved by it in *New York Times Co. v. Sullivan*¹⁰ and set aside the award of damages holding that the jury was not properly instructed in law. It directed a re-trial. Brennan, J. held:

"We hold that the constitutional protections for speech and press preclude the application of the New York statute to redress *false reports* of matters of public interest *in the absence of proof that the defendant published the report with the knowledge of its falsity or in reckless disregard of the truth.*" (emphasis added)

The learned Judge added:

"We create grave risk of serious impairment of the indispensable service of a free press in a free society if we saddle the press with the impossible burden of verifying to a certainty the facts associated in press news articles with a person's name, picture or portrait, particularly as related to non-defamatory matter.

Those guarantees are not for the benefit of the press so much as for the benefit of all of us. A broadly defined freedom of the press assures the maintenance of our political system and an open society.

That books, newspapers and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded...."

12. The next relevant decision is in *Cox Broadcasting Corpn. v. Cohn*¹¹. A Georgia law prohibited and punished the publication of the name of a rape victim. The appellant, a reporter of a newspaper obtained the name of the rape victim from the records of the court and published it. The father of the victim sued for damages. White, J. recognised that "in this sphere of collision between claims of privacy and those of the free press, the interests on both sides are plainly rooted in the traditions and significant concerns of our society" but chose to decide the case on the narrow question whether the press can be said to have violated the said statute or the right to privacy of the victim by publishing her name, having obtained it from public records. The learned Judge held that the press cannot be said to have violated the Georgia law or the right to privacy if it obtains the name of the rape victim from the public records and publishes it. The learned Judge held that the freedom of press to publish the information contained in the public records is

¹⁰ 376 US 254 : 11 L Ed 2d 686 (1964)

¹¹ 420 US 469 : 43 L Ed 2d 328 (1975)

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a of critical importance to the system of Government prevailing in that country and that, may be, in such matters "citizenry is the final judge of the proper conduct of public business".

b 13. Before proceeding further, we may mention that the two decisions of this Court referred to above (*Kharak Singh*¹ and *Gobind*²) as well as the two decisions of the United States Supreme Court, *Griswold*³ and *Roe v. Wade*⁴, referred to in *Gobind*², are cases of governmental invasion of privacy. *Kharak Singh*¹ was a case where the petitioner was put under surveillance as defined in Regulation 236 of the U.P. Police Regulations. It involved secret picketing of the house or approaches to the house of the suspect, domiciliary visits at night, periodical enquiries by police officers into repute, habits, association, income or occupation, reporting by police constables on the movements of the person etc. The regulation was challenged as violative of the fundamental rights guaranteed to the petitioner. A Special Bench of seven learned Judges held, by a majority, that the regulation was unobjectionable except to the extent it authorised domiciliary visits by police officers. Though right to privacy was referred to, the decision turned on the meaning and content of "personal liberty" and "life" in Article 21. *Gobind*² was also a case of surveillance under M.P. Police Regulations. *Kharak Singh*¹ was followed even while at the same time elaborating the right to privacy, as set out hereinbefore.

*Griswold*³ was concerned with a law made by the State of Connecticut which provided a punishment to "any person who uses any medicinal article or instrument for the purpose of preventing ...". The appellant was running a centre at which information and medical advice was given to married persons as to the means of preventing conception. They prescribed contraceptives for the purpose. The appellant was prosecuted under the aforesaid law, which led the appellant to challenge the constitutional validity of the law on the grounds of First and Fourteenth Amendments. Douglas, J., who delivered the main opinion, examined the earlier cases of that court and observed:

f "... specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help to give them life and substance. ... Various guarantees create zones of privacy.

* * *

g The present case, then concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which, in forbidding the use of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon the relationship. Such a law cannot stand in light of the familiar principle, so often applied by this Court, that a "governmental purpose to control or prevent activities constitutionally subject to State regulation may not be achieved by means which sweep unnecessarily broadly and thereby

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invade the area of protected freedoms". *NAACP v. Alabama*¹². Would we allow the police to search the sacred precincts of marital bedrooms of telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship. a

We deal with a *right of privacy* older than the Bill of Rights — older than our political parties, older than our schools system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions." b

15. *Roe v. Wade*⁴ concerned the right of an unmarried pregnant woman to terminate her pregnancy by abortion. The relevant Texas law prohibited abortions except with respect to those procured or admitted by medical advice for the purpose of saving the life of the mother. The constitutionality of the said law was questioned on the ground that the said law improperly invaded the right and the choice of a pregnant woman to terminate her pregnancy and therefore violative of 'liberty' guaranteed under Fourteenth Amendment and the right to privacy recognised in *Griswold*³. Blackmun, J. who delivered the majority opinion, upheld the right to privacy in the following words: c

"The Constitution does not explicitly mention any *right of privacy*. In a line of decisions, however,... the Court has recognised that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right in the First Amendment,... in the penumbras of the Bill of Rights,... in the Ninth Amendment,... or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment,... These decisions make it clear that only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty', *Palko v. Connecticut*¹³, are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage, *Loving v. Virginia*¹⁴; procreation, *Skinner v. Oklahoma*¹⁵; contraception; *Eisenstadt v. Baird*¹⁶; family relationships, *Prince v. Massachusetts*¹⁷; and child-rearing and education, *Pierce v. Society of Sisters*¹⁸, *Meyer v. Nebraska*¹⁹. d

12 377 US 288 : 12 L Ed 2d 325 (1964)

13 302 US 319 : 82 L Ed 288 (1937)

14 388 US 1 : 18 L Ed 2d 1010 (1967)

15 316 US 535 : 86 L Ed 1655 (1942)

16 405 US 438 : 31 L Ed 2d 349 (1972)

17 321 US 158 : 88 L Ed 645 (1944)

18 268 US 510 : 69 L Ed 1070 (1925)

19 262 US 390 : 67 L Ed 1042 (1923)

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a This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon State action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.

b Though this decision received a few knocks in the recent decision in *Planned Parenthood v. Casey*²⁰, the central holding of this decision has been left untouched — indeed affirmed.

c 16. We may now refer to the celebrated decision in *New York Times v. Sullivan*¹⁰, referred to and followed in *Time Inc. v. Hill*⁹. The following are the facts: In the year 1960, the New York Times carried a full page paid advertisement sponsored by the "Committee to Defend Martin Luther King and the Struggle for Freedom in the South", which asserted or implied that law-enforcement officials in Montgomery, Alabama, had improperly arrested and harassed Dr King and other civil rights demonstrators on various occasions. Respondent, who was the elected Police Commissioner of Montgomery, brought an action for libel against the *Times* and several of the individual signatories to the advertisement. It was found that some of the assertions contained in the advertisement were inaccurate. The Alabama courts found the defendants guilty and awarded damages in a sum of \$ 500,000, which was affirmed by the Alabama Supreme Court. According to the relevant Alabama law, a publication was "libellous per se" if the words "tend to injure a person ... in his reputation" or to "bring (him) into public contempt". The question raised before the United States Supreme Court was whether the said enactment abridged the freedom of speech and of the press guaranteed by the First and Fourteenth Amendments. In the leading opinion delivered by Brennan, J., the learned Judge referred in the first instance to the earlier decisions of that court emphasising the importance of freedom of speech and of the press and observed:

f "Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth — whether administered by judges, juries, or administrative officials — and especially one that puts the burden of proving the truth on the speaker.

g A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions — and to do so on pain of libel judgments virtually unlimited in amount—leads to ... "self-censorship". Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred. Even courts accepting this defense as an adequate safeguard have recognized the difficulties of adducing legal proofs that the alleged libel was true in all its factual particulars. ... Under such a rule, would-be critics of official

conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which 'steer far wider of the unlawful zone'.... The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments.

The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' — that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

(emphasis added)

17. Black, J. who was joined by Douglas, J. concurred in the opinion but on a slightly different ground. He affirmed his belief that "the First and Fourteenth Amendments not merely 'delimit' a State's power to award damages to 'public officials against critics of their official conduct' but completely prohibit a State from exercising such a power".

18. The principle of the said decision has been held applicable to "public figures" as well. This is for the reason that public figures like public officials often play an influential role in ordering society. It has been held that as a class the public figures have, as the public officials have, access to mass media communication both to influence the policy and to counter-criticism of their views and activities. On this basis, it has been held that the citizen has a legitimate and substantial interest in the conduct of such persons and that the freedom of press extends to engaging in uninhibited debate about the involvement of public figures in public issues and events.

19. The principle of *Sullivan*²¹ was carried forward — and this is relevant to the second question arising in this case — in *Derbyshire County Council v. Times Newspapers Ltd.*²², a decision rendered by the House of Lords. The plaintiff, a local authority brought an action for damages for libel against the defendants in respect of two articles published in *Sunday Times* questioning the propriety of investments made for its superannuation fund. The articles were headed "Revealed: Socialist tycoon deals with Labour Chief" and "Bizarre deals of a council leader and the media tycoon". A preliminary issue was raised whether the plaintiff has a cause of action against the defendant. The trial Judge held that such an action was maintainable but on appeal the Court of Appeal held to the contrary. When the matter reached the House of Lords, it affirmed the decision of the Court of Appeal but on a different ground. Lord Keith delivered the judgment agreed to by all other learned Law Lords. In his opinion, Lord Keith recalled that in *Attorney General v. Guardian Newspapers Ltd. (No. 2)*²² popularly known as "Spycatcher case", the House of Lords had opined that "there are

21 (1993) 2 WLR 449 : (1993) 1 All ER 1011, HL

22 (1990) 1 AC 109 (1988) 3 All ER 545 : (1988) 3 WLR 776, HL

a rights available to private citizens which institutions of... Government are not in a position to exercise unless they can show that it is in the public interest to do so". It was also held therein that not only was there no public interest in allowing governmental institutions to sue for libel, it was "contrary to the public interest because to admit such actions would place an undesirable fetter on freedom of speech" and further that action for defamation or threat of such action "inevitably have an inhibiting effect on freedom of speech". The learned Law Lord referred to the decision of the b United States Supreme Court in *New York Times v. Sullivan*¹⁰ and certain other decisions of American Courts and observed — and this is significant for our purposes—

c "while these decisions were related most directly to the provisions of the American Constitution concerned with securing freedom of speech, the public interest considerations which underlaid them are no less valid in this country. What has been described as 'the chilling effect' induced by the threat of civil actions for libel is very important. Quite often the facts which would justify a defamatory publication are known to be true, but admissible evidence capable of proving those facts is not available."

Accordingly, it was held that the action was not maintainable in law.

d 20. Reference in this connection may also be made to the decision of the Judicial Committee of the Privy Council in *Leonard Hector v. Attorney General of Antigua and Barbuda*²³ which arose under Section 33-B of the Public Order Act, 1972 (Antigua and Barbuda). It provided that any person who printed or distributed any false statement which was "likely to cause fear or alarm in or to the public or to disturb the public peace or to undermine public confidence in the conduct of public affairs" shall be guilty of an offence. The appellant, the editor of a newspaper, was prosecuted under e the said provision. He took the plea that the said provision contravened Section 12(1) of the Constitution of Antigua and Barbuda which provided that no person shall be hindered in the enjoyment of freedom of expression. At the same time, sub-section (4) of Section 12 stated that nothing contained f in or done under the authority of law was to be held inconsistent with or in contravention of sub-section 12(1) to the extent that the law in question made provisions reasonably required in the interest of public order. [These provisions roughly correspond to Articles 19(1)(a) and 19(2) respectively.] The Privy Council upheld the appellant's plea and declared Section 12(1) ultra vires the Constitution. It held that Section 33-B is wide enough to cover g not only false statements which are likely to affect public order but also those false statements which are not likely to affect public order. On that account, it was declared to be unconstitutional. The criminal proceedings against the appellant was accordingly quashed. In the course of his speech, Lord Bridge of Harwich observed thus:

h "In a free democratic society it is almost too obvious to need stating that those who hold office in Government and who are responsible for

public administration must always be open to criticism. Any attempt to stifle or fetter such criticism amounts to political censorship of the most insidious and objectionable kind. At the same time it is no less obvious that the very purpose of criticism levelled at those who have the conduct of public affairs by their political opponents is to undermine public confidence in their stewardship and to persuade the electorate that the opponents would make a better job of it than those presently holding office. In the light of these considerations their Lordships cannot help viewing a statutory provision which criminalises statements likely to undermine public confidence in the conduct of public affairs with the utmost suspicion."

21. The question is how far the principles emerging from the United States and English decisions are relevant under our constitutional system. So far as the freedom of press is concerned, it flows from the freedom of speech and expression guaranteed by Article 19(1)(a). But the said right is subject to reasonable restrictions placed thereon by an existing law or a law made after the commencement of the Constitution in the interests of or in relation to the several matters set out therein. Decency and defamation are two of the grounds mentioned in clause (2). Law of torts providing for damages for invasion of the right to privacy and defamation and Sections 499/500 IPC are the existing laws saved under clause (2). But what is called for today — in the present times — is a proper balancing of the freedom of press and said laws consistent with the democratic way of life ordained by the Constitution. Over the last few decades, press and electronic media have emerged as major factors in our nation's life. They are still expanding — and in the process becoming more inquisitive. Our system of Government demands — as do the systems of Government of the United States of America and United Kingdom — constant vigilance over exercise of governmental power by the press and the media among others. It is essential for a good Government. At the same time, we must remember that our society may not share the degree of public awareness obtaining in United Kingdom or United States. The sweep of the First Amendment to the United States Constitution and the freedom of speech and expression under our Constitution is not identical though similar in their major premises. All this may call for some modification of the principles emerging from the English and United States decisions in their application to our legal system. The broad principles set out hereinafter are evolved keeping in mind the above considerations. But before we set out those principles, a few more aspects need to be dealt with.

22. We may now consider whether the State or its officials have the authority in law to impose a prior restraint upon publication of material defamatory of the State or of the officials, as the case may be? We think not. No law empowering them to do so is brought to our notice. As observed in *New York Times v. United States*²⁴, popularly known as the *Pentagon papers case*, "any system of prior restraints of (freedom of) expression comes to this

24 (1971) 403 US 713 : 29 L Ed 2d 822 (1971)

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a Court bearing a heavy presumption against its constitutional validity” and that in such cases, the Government “carries a heavy burden of showing justification for the imposition of such a restraint”. We must accordingly hold that no such prior restraint or prohibition of publication can be imposed by the respondents upon the proposed publication of the alleged autobiography of “Auto Shankar” by the petitioners. This cannot be done either by the State or by its officials. In other words, neither the Government nor the officials who apprehend that they may be defamed, have the right to impose a prior restraint upon the publication of the alleged autobiography of Auto Shankar. The remedy of public officials/public figures, if any, will arise only after the publication and will be governed by the principles indicated herein.

c 23. We must make it clear that we do not express any opinion about the right of the State or its officials to prosecute the petitioners under Sections 499/500 IPC. This is for the reason that even if they are entitled to do so, there is no law under which they can prevent the publication of a material on the ground that such material is likely to be defamatory of them.

Question No. 3

d 24. It is not stated in the counter-affidavit that Auto Shankar had requested or authorised the prison officials or the Inspector General of Prisons, as the case may be, to adopt appropriate proceedings to protect his right to privacy. If so, the respondents cannot take upon themselves the obligation of protecting his right to privacy. No prison rule is brought to our notice which empowers the prison officials to do so. Moreover, the occasion for any such action arises only after the publication and not before, as indicated hereinabove.

e 25. Lastly, we must deal with the objection raised by the respondent as to the maintainability of the present writ petition. It is submitted that having filed a writ petition for similar reliefs in the Madras High Court, which was dismissed as not maintainable under a considered order, the petitioners could not have approached this Court under Article 32 of the Constitution. The petitioners, however, did disclose the above fact but they stated that on the date of their filing the writ petition, no orders were pronounced by the Madras High Court. It appears that the writ petition was filed at about the time the learned Single Judge of the Madras High Court pronounced the orders on the office objections. Having regard to the facts and circumstances of the case, we are not inclined to throw out the writ petition on the said ground. The present writ petition can also be and is hereby treated as a special leave petition against the orders of the learned Single Judge of the High Court.

g 26. We may now summarise the broad principles flowing from the above discussion:

h (1) The right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by Article 21. It is a “right to be let alone”. A citizen has a right to safeguard the privacy of his own,

his family, marriage, procreation, motherhood, child-bearing and education among other matters. None can publish anything concerning the above matters without his consent — whether truthful or otherwise and whether laudatory or critical. If he does so, he would be violating the right to privacy of the person concerned and would be liable in an action for damages. Position may, however, be different, if a person voluntarily thrusts himself into controversy or voluntarily invites or raises a controversy.

(2) The rule aforesaid is subject to the exception, that any publication concerning the aforesaid aspects becomes unobjectionable if such publication is based upon public records including court records. This is for the reason that once a matter becomes a matter of public record, the right to privacy no longer subsists and it becomes a legitimate subject for comment by press and media among others. We are, however, of the opinion that in the interests of decency {Article 19(2)} an exception must be carved out to this rule, viz., a female who is the victim of a sexual assault, kidnap, abduction or a like offence should not further be subjected to the indignity of her name and the incident being publicised in press/media.

(3) There is yet another exception to the rule in (1) above — indeed, this is not an exception but an independent rule. In the case of public officials, it is obvious, right to privacy, or for that matter, the remedy of action for damages is simply not available with respect to their acts and conduct relevant to the discharge of their official duties. This is so even where the publication is based upon facts and statements which are not true, unless the official establishes that the publication was made (by the defendant) with reckless disregard for truth. In such a case, it would be enough for the defendant (member of the press or media) to prove that he acted after a reasonable verification of the facts; it is not necessary for him to prove that what he has written is true. Of course, where the publication is proved to be false *and* actuated by malice or personal animosity, the defendant would have no defence and would be liable for damages. It is equally obvious that in matters not relevant to the discharge of his duties, the public official enjoys the same protection as any other citizen, as explained in (1) and (2) above. It needs no reiteration that judiciary, which is protected by the power to punish for contempt of court and Parliament and legislatures protected as their privileges are by Articles 105 and 104 respectively of the Constitution of India, represent exceptions to this rule.

(4) So far as the Government, local authority and other organs and institutions exercising governmental power are concerned, they cannot maintain a suit for damages for defaming them.

(5) Rules 3 and 4 do not, however, mean that Official Secrets Act, 1923, or any similar enactment or provision having the force of law does not bind the press or media.

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(6) There is no law empowering the State or its officials to prohibit, or to impose a prior restraint upon the press/media.

a 27. We may hasten to add that the principles above mentioned are only the broad principles. They are neither exhaustive nor all-comprehending; indeed no such enunciation is possible or advisable. As rightly pointed out by Mathew, J., this right has to go through a case-by-case development. The concepts dealt with herein are still in the process of evolution.

b 28. In all this discussion, we may clarify, we have not gone into the impact of Article 19(1)(a) read with clause (2) thereof on Sections 499 and 500 of the Indian Penal Code. That may have to await a proper case.

c 29. Applying the above principles, it must be held that the petitioners have a right to publish, what they allege to be the life story/autobiography of Auto Shankar insofar as it appears from the public records, even without his consent or authorisation. But if they go beyond that and publish his life story, they may be invading his right to privacy and will be liable for the consequences in accordance with law. Similarly, the State or its officials cannot prevent or restrain the said publication. The remedy of the affected public officials/public figures, if any, is after the publication, as explained hereinabove.

d 30. The writ petition is accordingly allowed in the above terms. No costs.

(1994) 6 Supreme Court Cases 651

(BEFORE M.N. VENKATACHALIAH, C.J. AND M.M. PUNCHHI,
AND S. MOHAN, JJ.)

e TATA CELLULAR .. Appellant;

Versus

UNION OF INDIA .. Respondent.

Civil Appeal Nos. 4947-50 of 1994[†] with Nos. 4951 and 4952 of
1994, decided on July 26, 1994

f A. Administrative Law — Judicial review — Scope — Govt. contracts —
Tenders — State decision/action on must be in consonance with Art. 14 — Only
the decision-making process and not the merits of the decision itself is
reviewable as court does not sit as appellate court while exercising power of
review — Decision/action when open to review — Test — While court cannot
interfere with Govt.'s freedom of contract, invitation of tender and refusal of
g any tender which pertain to policy matter, but whether the decision/action is
vitiating by arbitrariness, unfairness, illegality, irrationality or 'Wednesbury
unreasonableness' i.e. when decision is such as no reasonable person on proper
application of mind could take or procedural impropriety, can be looked into
by court — Test is whether wrong is of such a nature as to require intervention
— If so court would set right the decision-making process — But it would not

h [†] From the Judgment and Order dated 26-2-1993 of the Delhi High Court in C.W. Nos. 4030-32,
4302 of 1992 and 163 of 1993

PEOPLE'S UNION FOR CIVIL LIBERTIES v. UNION OF INDIA

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(1997) 1 Supreme Court Cases 301

(BEFORE KULDIP SINGH AND S. SAGHIR AHMAD, JJ.)

a PEOPLE'S UNION FOR CIVIL LIBERTIES (PUCL) .. Petitioner;

Versus

UNION OF INDIA AND ANOTHER .. Respondents.

Writ Petition (C) No. 256 of 1991†, decided on December 18, 1996

b A. Constitution of India — Arts. 21, 19(1)(a) & (2), 14 and 32 — Right to transmit telephone message or hold telephone conversation in privacy — Held, forms part of right to privacy protected by Art. 21 as well as by Art. 17 of International Covenant on Civil and Political Rights — It is also covered by freedom of speech and expression under Art. 19(1)(a) — Telephone tapping by Govt. under S. 5(2) of Telegraph Act amounts to infraction of these Fundamental Rights — Hence it can be resorted to only in accordance with procedure established by law which must be just, fair and reasonable and should fall within the grounds of reasonable restriction permissible under Art. 19(2) — Additionally, interception of telephonic messages permitted by S. 5(2) of the Telegraph Act must conform to the conditions laid down by S. 5(2) for such interception — International Covenant on Civil and Political Rights, 1966, Art. 17 — Universal Declaration of Human Rights, 1948, Art. 12 — Telegraph Act, 1885, Ss. 5(2) & 7(2)(b) — Words and phrases — “Right to privacy”

d B. Constitution of India — Arts. 21 and 51 — Human rights — Art. 21 to be interpreted in conformity with international law viz. Art. 17 of International Covenant on Civil and Political Rights, 1966 — Art. 12 of Universal Declaration of Human Rights, 1948 is also similar to Art. 17 of the 1966 Covenant — Universal Declaration of Human Rights, 1948 — International Covenant on Civil and Political Rights, 1966

e C. Telegraph Act, 1885 — Ss. 5(2) and 7(2)(b) — Interception of telegraphic messages/tapping of telephone conversation — When can be resorted to under S. 5(2) — ‘Occurrence of any public emergency’ or ‘in the interest of public safety’ is condition precedent in addition to existence of any of the grounds under Art. 19(2) — Order recording such satisfaction in writing necessary — ‘Public emergency’ and ‘public safety’ — Meaning — Though substantive provision of S. 5(2) clearly laid down conditions/situations for interception of messages but in absence of rules under S. 7(2)(b) laying down just, fair and reasonable procedure for exercise of power under S. 5(2), rights guaranteed under Arts. 19(1)(a) and 21 cannot be safeguarded — Central Govt. should, therefore, frame the rules — But till such rules are framed, procedural safeguards laid down by Supreme Court for exercise of power under S. 5(2) to be followed — However, prior judicial scrutiny cannot be provided as a procedural safeguard for issuing order for telephone tapping in absence of any provision in that regard in the Act

g D. International Law — Scope — Now no more confined to relations between States but extends to matters of social concern such as health, education, economics as also human rights — Constitution of India, Art. 51

h

† Under Article 32 of the Constitution of India

E. International Law — Customary international law — Rules of, if not contrary to municipal law, shall be deemed to be incorporated in domestic law — Constitution of India, Arts. 51, 13, 32 and 226

Held :

Right to privacy is a part of the right to "life" and "personal liberty" enshrined under Article 21 of the Constitution. Once the facts in a given case constitute a right to privacy, Article 21 is attracted. The said right cannot be curtailed "except according to procedure established by law". (Para 17)

Kharak Singh v. State of U.P., (1964) 1 SCR 332 . AIR 1963 SC 1295, *Gobind v. State of M.P.*, (1975) 2 SCC 148 : 1975 SCC (Cn) 468, *R. Rajagopal v. State of T.N.*, (1994) 6 SCC 632, *relied on*

Munn v. Illinois, 94 US 113 : 24 L Ed 77 (1877); *Wolf v. Colorado*, 338 US 25 : 93 L Ed 1782 (1949); *Semayne's case*, (1604) 5 Co Rep 91 a, *cited*

The right to privacy — by itself — has not been identified under the Constitution. As a concept it may be too broad and moralistic to define it judicially. Whether right to privacy can be claimed or has been infringed in a given case would depend on the facts of the said case. But the right to hold a telephone conversation in the privacy of one's home or office without interference can certainly be claimed as "right to privacy". Conversations on the telephone are often of an intimate and confidential character. Telephone conversation is a part of modern man's life. Telephone conversation is an important facet of a man's private life. Right to privacy would certainly include telephone conversation in the privacy of one's home or office. Telephone-tapping would, thus, infract Article 21 of the Constitution of India unless it is permitted under the procedure established by law. (Para 18)

India is a signatory to the International Covenant on Civil and Political Rights, 1966. Article 17 thereof provides for right of privacy. Article 12 of the Universal Declaration of Human Rights, 1948 is almost in similar terms. Article 17 of the International Covenant does not go contrary to any part of our municipal law. Article 21 of the Constitution has, therefore, to be interpreted in conformity with the international law. (Paras 20 and 26)

Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225 : 1973 Supp SCR 1; *A.D.M. v. Shivakant Shukla*, (1976) 2 SCC 521; *Jolly George Varghese v. Bank of Cochin*, (1980) 2 SCC 360 : AIR 1980 SC 470, *relied on*

It is almost an accepted proposition of law that the rules of customary international law which are not contrary to the municipal law shall be deemed to be incorporated in the domestic law. International law today is not confined to regulating the relations between the States. Scope continues to extend. Today matters of social concern, such as health, education and economics apart from human rights fall within the ambit of International Regulations. International law is more than ever aimed at individuals. (Paras 22 and 21)

Freedom of speech and expression guaranteed under Article 19(1)(a) means the right to express one's convictions and opinions freely by word of mouth, writing, printing, picture, or in any other manner. When a person is talking on telephone, he is exercising his right to freedom of speech and expression. Telephone-tapping unless it comes within the grounds of restrictions under Article 19(2) would infract Article 19(1)(a). (Para 19)

The vires of Section 5(2) has not been seriously challenged in this case. Section 5(2) of the Act permits the interception of messages in accordance with the provisions of the said section. "Occurrence of any public emergency" or "in the interest of public safety" are the sine qua non for the application of the provisions of Section 5(2) of the Act. Unless a public emergency has occurred or the interest of

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- a public safety demands, the authorities have no jurisdiction to exercise the powers under the said section. Public emergency would mean the prevailing of a sudden condition or state of affairs affecting the people at large calling for immediate action. The expression "public safety" means the state or condition of freedom from danger or risk for the people at large. When either of these two conditions are not in existence, the Central Government or a State Government or the authorised officer cannot resort to telephone-tapping. Even if the Central Government is satisfied that it is necessary or expedient so to do in the interest of the sovereignty and integrity of India or the security of the State or friendly relations with sovereign States or public order or for preventing incitement to the commission of an offence, it cannot intercept the messages or resort to telephone-tapping unless a public emergency has occurred or the interest of public safety or the existence of the interest of public safety requires. Neither the occurrence of public emergency nor the interest of public safety are secretive conditions or situations. Either of the situations would be apparent to a reasonable person. (Paras 27 and 28)

Hukam Chand Shyam Lal v. Union of India, (1976) 2 SCC 128, *relied on*

- c The first step under Section 5(2) of the Act, therefore, is the occurrence of any public emergency or the existence of a public safety interest. Thereafter the competent authority under Section 5(2) of the Act is empowered to pass an order of interception after recording its satisfaction that it is necessary or expedient so to do in the interest of (i) sovereignty and integrity of India, (ii) the security of the State, (iii) friendly relations with foreign States, (iv) public order or (v) for preventing incitement to the commission of an offence. When any of the five situations mentioned above to the satisfaction of the competent authority require then the said authority may pass the order for interception of messages by recording reasons in writing for doing so. (Para 29)

- e Section 5(2) of the Act shows that so far the power to intercept messages/ conversations is concerned the section clearly lays down the situations/conditions under which it can be exercised. But the substantive law as laid down in Section 5(2) of the Act must have procedural backing so that the exercise of power is fair and reasonable. The said procedure itself must be just, fair and reasonable. "Procedure" must rule out anything arbitrary, freakish or bizarre. A valuable constitutional right can be canalised only by civilised processes. (Para 30)

Maneka Gandhi v. Union of India, (1978) 1 SCC 248 : (1978) 2 SCR 621, *relied on*

- f No rules have been framed under Section 7(2)(b) of the Act for providing the precautions to be taken for preventing the improper interception or disclosure of messages. In the absence of just and fair procedure for regulating the exercise of power under Section 5(2) of the Act, it is not possible to safeguard the rights of the citizens guaranteed under Articles 19(1)(a) and 21 of the Constitution of India. (Para 31)

- g Again, in the absence of any provision in the statute, it is not possible to provide for prior judicial scrutiny as a procedural safeguard. It is for the Central Government to make rules under Section 7(2)(b) of the Act. The Act was enacted in the year 1885. The power to make rules under Section 7 of the Act has been there for over a century but the Central Government has not thought it proper to frame the necessary rules despite severe criticism of the manner in which the power under Section 5(2) has been exercised. It is entirely for the Central Government to make rules on the subject but till the time it is done the right to privacy of an individual has to be safeguarded. In order to rule out arbitrariness in the exercise of power under Section 5(2) of the Act and till the time the Central Government lays down just, fair and reasonable procedure under Section 7(2)(b) of the Act, it is necessary to lay down

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procedural safeguards for the exercise of power under Section 5(2) so that the right to privacy of a person is protected. (Para 34)

[Accordingly, the Supreme Court issued order and directions in this regard.] a
(Para 35)

WP disposed of R-M/17239/C

Advocates who appeared in this case :

Kapil Sibal and Rajinder Sachar, Senior Advocates (Ms Rashmi Kapadi and Ms Sanjay Parikh, Advocates, with them) for the Petitioner;
Venugopal Reddy, Senior Advocate (P. Parameswaran, Hemant Sharma and Ms Anil Katiyar, Advocates, with him) for the Respondents. b

Chronological list of cases cited	on page(s)
1. (1994) 6 SCC 632, <i>R. Rajagopal v. State of T.N</i>	310g
2. (1980) 2 SCC 360 : AIR 1980 SC 470, <i>Jolly George Varghese v. Bank of Cochin</i>	312e
3. (1978) 1 SCC 248 : (1978) 2 SCR 621, <i>Maneka Gandhi v. Union of India</i>	314f
4. (1976) 2 SCC 521, <i>A.D.M. v. Shivakant Shukla</i>	312c
5. (1976) 2 SCC 128, <i>Hukam Chand Shyam Lal v. Union of India</i>	313a
6. (1975) 2 SCC 148 : 1975 SCC (Cri) 468, <i>Gobind v. State of M.P.</i>	310e-f, 310g-h
7. (1973) 4 SCC 225 : 1973 Supp SCR 1, <i>Kesavananda Bharati v. State of Kerala</i>	312b
8. (1964) 1 SCR 332 : AIR 1963 SC 1295, <i>Kharak Singh v. State of U P.</i>	308b, 308c-d, 310e, 310g
9. (1604) 5 Co Rep 91 a, <i>Semayne's case</i>	309e-f, 309f
10. 338 US 25 : 93 L Ed 1782 (1949), <i>Wolf v. Colorado</i>	308g-h, 310b-c
11. 94 US 113 : 24 L Ed 77 (1877), <i>Munn v. Illinois</i>	308d

The Judgment of the Court was delivered by

KULDIP SINGH, J.— Telephone-tapping is a serious invasion of an individual's privacy. With the growth of highly sophisticated communication technology, the right to hold telephone conversation, in the privacy of one's home or office without interference, is increasingly susceptible to abuse. It is no doubt correct that every Government, howsoever democratic, exercises some degree of sub rosa operation as a part of its intelligence outfit but at the same time citizen's right to privacy has to be protected from being abused by the authorities of the day. e

2. This petition — public interest — under Article 32 of the Constitution of India has been filed by the People's Union of Civil Liberties, a voluntary organisation, highlighting the incidents of telephone-tapping in the recent past. The petitioner has challenged the constitutional validity of Section 5(2) of the Indian Telegraph Act, 1885 (the Act), in the alternative it is contended that the said provisions be suitably read down to include procedural safeguards to rule out arbitrariness and to prevent the indiscriminate telephone-tapping. g

3. The writ petition was filed in the wake of the report on "Tapping of politicians' phones" by the Central Bureau of Investigation (CBI). Copy of the report as published in the *Mainstream*, Vol. XXIX dated 26-3-1991 has been placed on record along with the rejoinder filed by the petitioner. The h

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authenticity of the report has not been questioned by the learned counsel for the Union of India before us. Paras 21 and 22 of the report are as under:

a "21. Investigation has revealed the following lapses on the part of MTNL

(i) In respect of 4 telephone numbers though they were shown to be under interception in the statement supplied by MTNL, the authorisation for putting the number under interception could not be provided. This shows that records have not been maintained properly.

b (ii) In respect of 279 telephone numbers, although authority letters from various authorised agencies were available, these numbers have not been shown in lists supplied by MTNL showing interception of telephones to the corresponding period. This shows that lists supplied were incomplete.

c (iii) In respect of 133 cases, interception of the phones were done beyond the authorised part. The GM (O), MTNL in his explanation has said that this was done in good faith on oral requests of the representatives of the competent authorities and that instructions have now been issued that interception beyond authorised periods will be done only on receipt of written requests.

d (iv) In respect of 111 cases, interception of telephones have exceeded 180 days' period and no permission of Government for keeping the telephone under interception beyond 180 days was taken.

e (v) The files pertaining to interception have not been maintained properly.

f 22. Investigation has also revealed that various authorised agencies are not maintaining the files regarding interception of telephones properly. One agency is not maintaining even the logbooks of interception. The reasons for keeping a telephone number on watch have also not been maintained properly. The effectiveness of the results of observation have to be reported to the Government in quarterly returns which is also not being sent in time and does not contain all the relevant information. In the case of agencies other than IB, the returns are submitted to the MHA. The periodicity of maintenance of the records is not uniform. It has been found that whereas DRI keeps record for the last 5 years, in case of IB, as soon as the new quarterly statement is prepared, the old returns are destroyed for reasons of secrecy. The desirability of maintenance of uni-return and periodicity of these documents needs to be examined."

Section 5(2) of the Act is as under:

h "5. (2) On the occurrence of any public emergency, or in the interest of the public safety, the Central Government or a State Government or any officer specially unauthorised in this behalf by the Central Government or a State Government may, if satisfied that it is necessary

or expedient so to do in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States or public order or for preventing incitement to the commission of an offence, for reasons to be recorded in writing, by order, direct that any message or class of messages to or from any person or class of persons, or relating to any particular subject, brought for transmission by or transmitted or received by any telegraph, shall not be transmitted, or shall be intercepted or detained, or shall be disclosed to the Government making the order or an officer thereof mentioned in the order:

Provided that press messages intended to be published in India of correspondents accredited to the Central Government or a State Government shall not be intercepted or detained, unless their transmission has been prohibited under this sub-section."

4. The above provisions clearly indicate that in the event of the occurrence of a public emergency or in the interest of public safety the Central Government or the State Government or any officer specially authorised in this behalf, can intercept messages if satisfied that it is necessary or expedient so to do in the interest of:

- (i) The sovereignty and integrity of India.
- (ii) The security of the State.
- (iii) Friendly relations with foreign States.
- (iv) Public order.
- (v) For preventing incitement to the commission of an offence.

5. The CBI report indicates that under the above provisions of law Director Intelligence Bureau, Director General Narcotics Control Bureau, Revenue Intelligence and Central Economic Intelligence Bureau and the Director Enforcement Directorate have been authorised by the Central Government to do interception for the purposes indicated above. In addition, the State Governments generally give authorisation to the Police/Intelligence agencies to exercise the powers under the Act.

6. The Assistant Director General, Department of Telecom has filed counter-affidavit on behalf of the Union of India. The stand taken by the Union of India is as under:

"The allegation that the party in power at the Centre/State or officer authorised to tap the telephone by the Central/State Government could misuse this power is not correct. Tapping of telephone could be done only by the Central/State Government order by the officer specifically authorised by the Central/State Government on their behalf and it could be done only under certain conditions such as national emergency in the interest of public safety, security of State, public order etc. It is also necessary to record the reasons for tapping before tapping is resorted to. If the party, whose telephone is to be tapped is to be informed about this and also the reasons for tapping, it will defeat the very purpose of tapping of telephone. By the very sensitive nature of the work, it is

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a absolutely necessary to maintain secrecy in the matter. In spite of safeguards, if there is alleged misuse of the powers regarding tapping of telephones by any authorised officer, the aggrieved party could represent to the State Government/Central Government and suitable action could be taken as may be necessary. Striking down the provision Section 5(2) of the Indian Telegraph Act, is not desirable as it will jeopardise public interest and security of the State."

b 7. Section 7(2)(b) of the Act which gives rule-making power to the Central Government is as under:

"7. *Power to make rules for the conduct of telegraphs.*—(1) The Central Government may, from time to time, by notification in the Official Gazette, make rules consistent with this Act for the conduct of all or any telegraphs established, maintained or worked by the Government or by the persons licensed under this Act.

c (2) Rules under this section may provide for all or any of the following among other matters, that is to say:

(a) * * *

(b) the precautions to be taken for preventing the improper interception or disclosure of messages."

d No rules have been framed by the Central Government under the provisions quoted above.

e 8. Mr Rajinder Sachar, Senior Advocate, assisted by Mr Sanjay Parikh, vehemently contended that right to privacy is a fundamental right guaranteed under Article 19(1) and Article 21 of the Constitution of India. According to Mr Sachar to save Section 5(2) of the Act from being declared unconstitutional it is necessary to read down the said provision to provide adequate machinery to safeguard the right to privacy. Prior judicial sanction — *ex parte* in nature — according to Mr Sachar, is the only safeguard, which can eliminate the element of arbitrariness or unreasonableness. Mr Sachar contended that not only the substantive law but also the procedure provided therein has to be just, fair and reasonable.

f 9. While hearing the arguments on 26-9-1995, this Court passed the following order:

g "Mr Parikh is on his legs. He has assisted us in this matter for about half an hour. At this stage, Mr Kapil Sibal and Dr Dhavan, who are present in Court, stated that according to them the matter is important and they being responsible members of the Bar, are duty-bound to assist this Court in a matter like this. We appreciate the gesture. We permit them to intervene in this matter. They need a short adjournment to assist us.

The matter is adjourned to 11-10-1995."

h 10. While assisting this Court Mr Kapil Sibal at the outset stated that in the interest of the security and sovereignty of India and to deal with any other emergency situation for the protection of national interest, messages

may indeed be intercepted. According to him the core question for determination is whether there are sufficient procedural safeguards to rule out arbitrary exercise of power under the Act. Mr Sibal contended that Section 5(2) of the Act clearly lays down the conditions/situations which are sine qua non for the exercise of the power but the manner in which the said power can be exercised has not been provided. According to him procedural safeguards — short of prior judicial scrutiny — shall have to be read in Section 5(2) of the Act to save it from the vice of arbitrariness.

11. Both sides have relied upon the seven-Judge Bench judgment of this Court in *Kharak Singh v. State of U.P.*¹ The question for consideration before this Court was whether “surveillance” under Chapter XX of the U.P. Police Regulations constituted an infringement of any of the fundamental rights guaranteed by Part III of the Constitution. Regulation 236(b) which permitted surveillance by “domiciliary visits at night” was held to be violative of Article 21 on the ground that there was no “law” under which the said regulation could be justified.

12. The word “life” and the expression “personal liberty” in Article 21 were elaborately considered by this Court in *Kharak Singh case*¹. The majority read “right to privacy” as part of the right to life under Article 21 of the Constitution on the following reasoning:

“We have already extracted a passage from the judgment of Field, J. in *Munn v. Illinois*² US at p. 142, where the learned Judge pointed out that ‘life’ in the 5th and 14th Amendments of the U.S. Constitution corresponding to Article 21, means not merely the right to the continuance of a person’s animal existence, but a right to the possession of each of his organs — his arms and legs etc. We do not entertain any doubt that the word ‘life’ in Article 21 bears the same signification. Is then the word ‘personal liberty’ to be construed as excluding from its purview an invasion on the part of the police of the sanctity of a man’s home and an intrusion into his personal security and his right to sleep which is the normal comfort and a dire necessity for human existence even as an animal? It might not be inappropriate to refer here to the words of the preamble to the Constitution that it is designed to ‘assure the dignity of the individual’ and therefore of those cherished human values as the means of ensuring his full development and evolution. We are referring to these objectives of the framers merely to draw attention to the concepts underlying the Constitution which would point to such vital words as ‘personal liberty’ having to be construed in a reasonable manner and to be attributed that sense which would promote and achieve those objectives and by no means to stretch the meaning of the phrase to square with any preconceived notions or doctrinaire constitutional theories. Frankfurter, J. observed in *Wolf v. Colorado*³:

¹ (1964) 1 SCR 332 AIR 1963 SC 1295

² 94 US 113 24 L Ed 77 (1877)

³ 338 US 25 93 L Ed 1782 (1949)

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a 'The security of one's privacy against arbitrary intrusion by the police ... is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause. The knock at the door, whether by day or by night, as a prelude to a search, without authority of law but solely on the authority of the police, did not need the commentary of recent history to be condemned as inconsistent with the conception of human rights enshrined in the history and the basic constitutional documents of English-speaking peoples We have no hesitation in saying that were a State affirmatively to sanction such police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment.'

b Murphy, J. considered that such invasion was against 'the very essence of a scheme of ordered liberty'.

c It is true that in the decision of the U.S. Supreme Court from which we have made these extracts, the Court had to consider also the impact of a violation of the Fourth Amendment which reads:

d 'The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.'

e and that our Constitution does not in terms confer any like constitutional guarantee. Nevertheless, these extracts would show that an unauthorised intrusion into a person's home and the disturbance caused to him thereby, is as it were the violation of a common law right of a man — an ultimate essential of ordered liberty, if not of the very concept of civilisation. An English Common Law maxim asserts that 'every man's house is his castle' and in *Semayne case*⁴, where this was applied, it was stated that 'the house of everyone is to him as his castle and fortress as well as for his defence against injury and violence as for his repose'. We are not unmindful of the fact that *Semayne case*⁴ was concerned with the law relating to executions in England, but the passage extracted has a validity quite apart from the context of the particular decision. It embodies an abiding principle which transcends mere protection of property rights and expounds a concept of 'personal liberty' which does not rest on any element of feudalism or on any theory of freedom which has ceased to be of value.

g In our view clause (b) of Regulation 236 is plainly violative of Article 21 and as there is no 'law' on which the same could be justified it must be struck down as unconstitutional."

h 13. Subba Rao, J. (as the learned Judge then was) in his minority opinion also came to the conclusion that right to privacy was a part of Article 21 of

⁴ *Semayne's case*, (1604) 5 Co Rep 91 a

the Constitution but went a step further and struck down Regulation 236 as a whole on the following reasoning:

"Further, the right to personal liberty takes in not only a right to be free from restrictions placed on his movements, but also free from encroachments on his private life. It is true our Constitution does not expressly declare a right to privacy as a fundamental right, but the said right is an essential ingredient of personal liberty. Every democratic country sanctifies domestic life; it is expected to give him rest, physical happiness, peace of mind and security. In the last resort, a person's house, where he lives with his family, is his 'castle': it is his rampart against encroachment on his personal liberty. The pregnant words of that famous Judge, Frankfurter J., in *Wolf v. Colorado*³, pointing out the importance of the security of one's privacy against arbitrary intrusion by the police, could have no less application to an Indian home as to an American one. If physical restraints on a person's movements affect his personal liberty, physical encroachments on his private life would affect it in a larger degree. Indeed, nothing is more deleterious to a man's physical happiness and health than a calculated interference with his privacy. We would, therefore, define the right of personal liberty in Article 21 as a right of an individual to be free from restrictions or encroachments on his person, whether those restrictions or encroachments are directly imposed or indirectly brought about by calculated measures. If so understood, all the acts of surveillance under Regulation 236 infringe the fundamental right of the petitioner under Article 21 of the Constitution."

14. Article 21 of the Constitution has, therefore, been interpreted by all the seven learned Judges in *Kharak Singh case*¹ (majority and the minority opinions) to include that "right to privacy" as a part of the right to "protection of life and personal liberty" guaranteed under the said Article.

15. In *Gobind v. State of M.P.*⁵ a three-Judge Bench of this Court considered the constitutional validity of Regulations 855 and 856 of the Madhya Pradesh Police Regulations which provided surveillance by way of several measures indicated in the said regulations. This Court upheld the validity of the regulations by holding that Article 21 was not violated because the impugned regulations were "procedure established by law" in terms of the said Article.

16. In *R. Rajagopal v. State of T.N.*⁶ Jeevan Reddy, J. speaking for the Court observed that in recent times right to privacy has acquired constitutional status. The learned Judge referred to *Kharak Singh case*¹, *Gobind case*⁵ and considered a large number of American and English cases and finally came to the conclusion that "the right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by Article 21. It is a 'right to be let alone'." A citizen has a right "to safeguard the

⁵ (1975) 2 SCC 148 : 1975 SCC (Cri) 468

⁶ (1994) 6 SCC 632

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privacy of his own, his family, marriage, procreation, motherhood, child-bearing and education among other matters".

a 17. We have, therefore, no hesitation in holding that right to privacy is a part of the right to "life" and "personal liberty" enshrined under Article 21 of the Constitution. Once the facts in a given case constitute a right to privacy, Article 21 is attracted. The said right cannot be curtailed "except according to procedure established by law".

b 18. The right to privacy — by itself — has not been identified under the Constitution. As a concept it may be too broad and moralistic to define it judicially. Whether right to privacy can be claimed or has been infringed in a given case would depend on the facts of the said case. But the right to hold a telephone conversation in the privacy of one's home or office without interference can certainly be claimed as "right to privacy". Conversations on the telephone are often of an intimate and confidential character. Telephone c conversation is a part of modern man's life. It is considered so important that more and more people are carrying mobile telephone instruments in their pockets. Telephone conversation is an important facet of a man's private life. Right to privacy would certainly include telephone conversation in the privacy of one's home or office. Telephone-tapping would, thus, infract Article 21 of the Constitution of India unless it is permitted under the d procedure established by law.

e 19. Right to freedom of speech and expression is guaranteed under Article 19(1)(a) of the Constitution. This freedom means the right to express one's convictions and opinions freely by word of mouth, writing, printing, picture, or in any other manner. When a person is talking on telephone, he is exercising his right to freedom of speech and expression. Telephone-tapping unless it comes within the grounds of restrictions under Article 19(2) would infract Article 19(1)(a) of the Constitution.

20. India is a signatory to the International Covenant on Civil and Political Rights, 1966. Article 17 of the said covenant is as under:

"Article 17

f 1. No one shall be subject to arbitrary or unlawful interference with his privacy, family, human or correspondence, nor to lawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks."

g Article 12 of the Universal Declaration of Human Rights, 1948 is almost in similar terms.

h 21. International law today is not confined to regulating the relations between the States. Scope continues to extend. Today matters of social concern, such as health, education and economics apart from human rights fall within the ambit of International Regulations. International law is more than ever aimed at individuals.

22. It is almost an accepted proposition of law that the rules of customary international law which are not contrary to the municipal law shall be deemed to be incorporated in the domestic law. a

23. Article 51 of the Constitution directs that the State shall endeavour to inter alia, foster respect for international law and treaty obligations in the dealings of organised peoples with one another. Relying upon the said Article, Sikri, C.J. in *Kesavananda Bharati v. State of Kerala*⁷ observed as under: (SCC p. 333, para 151)

“... it seems to me that, in view of Article 51 of the directive principles, this Court must interpret language of the Constitution, if not intractable, which is after all a municipal law, in the light of the United Nations Charter and the solemn declaration subscribed to by India.”

24. In *A.D.M. v. Shivakant Shukla*⁸ Khanna J. in his minority opinion observed as under: (SCC p. 754, para 542)

“Equally well established is the rule of construction that if there be a conflict between the municipal law on one side and the international law or the provisions of any treaty obligations on the other, the courts would give effect to municipal law. If, however, two constructions of the municipal law are possible, the courts should lean in favour of adopting such construction as would make the provisions of the municipal law to be in harmony with the international law or treaty obligations. Every statute, according to this rule, is interpreted, so far as its language permits, so as not to be inconsistent with the comity of nations, or the established rules of international law, and the court will avoid a construction which would give rise to such inconsistency unless compelled to adopt it by plain and unambiguous language.” c
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25. In *Jolly George Varghese v. Bank of Cochin*⁹ Krishna Iyer, J. posed the following question:

“From the perspective of international law the question posed is whether it is right to enforce a contractual liability by imprisoning a debtor in the teeth of Article 11 of the International Covenant on Civil and Political Rights. The Article reads: f

No one shall be imprisoned merely *on the ground of inability to fulfil a contractual obligation.*” (emphasis added)

The learned Judge interpreted Section 51 of the Code of Civil Procedure consistently with Article 11 of the International Covenant.

26. Article 17 of the International Covenant — quoted above — does not go contrary to any part of our municipal law. Article 21 of the Constitution has, therefore, been interpreted in conformity with the international law. g

27. Learned counsel assisting us in this case have not seriously challenged the constitutional vires of Section 5(2) of the Act. In this respect

⁷ (1973) 4 SCC 225 : 1973 Supp SCR 1 h

⁸ (1976) 2 SCC 521

⁹ (1980) 2 SCC 360 AIR 1980 SC 470

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it would be useful to refer to the observations of this Court in *Hukam Chand Shyam Lal v. Union of India*¹⁰: (SCC pp. 131-32, para 13)

- a "Section 5(1) if properly construed, does not confer unguided and unbridled power on the Central Government/State Government/specially authorised officer to take possession of any telegraph. Firstly, the occurrence of a 'public emergency' is the sine qua non for the exercise of power under this section. As a preliminary step to the exercise of further jurisdiction under this section the Government or the authority
- b concerned must record its satisfaction as to the existence of such an emergency. Further, the existence of the emergency which is a prerequisite for the exercise of power under this section, must be a 'public emergency' and not any other kind of emergency. The expression 'public emergency' has not been defined in the statute, but contours broadly delineating its scope and features are discernible from the
- c section which has to be read as a whole. In sub-section (1) the phrase 'occurrence of any public emergency' is connected with and is immediately followed by the phrase 'or in the interests of the public safety'. These two phrases appear to take colour from each other. In the first part of sub-section (2) those two phrases again occur in association with each other, and the context further clarifies with amplification that
- d a public 'emergency' within the contemplation of this section is one which raises problems concerning the interest of the public safety, the sovereignty and integrity of India, the security of the State, friendly relations with foreign States or public order or the prevention of incitement to the commission of an offence. It is in the context of these matters that the appropriate authority has to form an opinion with regard
- e to the occurrence of a 'public emergency' with a view to taking further action under this section. Economic emergency is not one of those matters expressly mentioned in the statute. Mere 'economic emergency' — as the High Court calls it — may not necessarily amount to a 'public emergency' and justify action under this section unless it raises problems relating to the matters indicated in the section."
- f As mentioned above, the primary contention raised by the learned counsel is to lay down necessary safeguards to rule out the arbitrary exercise of power under the Act.

- g 28. Section 5(2) of the Act permits the interception of messages in accordance with the provisions of the said section. "Occurrence of any public emergency" or "in the interest of public safety" are the sine qua non for the application of the provisions of Section 5(2) of the Act. Unless a public emergency has occurred or the interest of public safety demands, the authorities have no jurisdiction to exercise the powers under the said section. Public emergency would mean the prevailing of a sudden condition or state of affairs affecting the people at large calling for immediate action. The expression "public safety" means the state or condition of freedom from
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danger or risk for the people at large. When either of these two conditions are not in existence, the Central Government or a State Government or the authorised officer cannot resort to telephone-tapping even though there is satisfaction that it is necessary or expedient so to do in the interests of sovereignty and integrity of India etc. In other words, even if the Central Government is satisfied that it is necessary or expedient so to do in the interest of the sovereignty and integrity of India or the security of the State or friendly relations with sovereign States or public order or for preventing incitement to the commission of an offence, it cannot intercept the messages or resort to telephone-tapping unless a public emergency has occurred or the interest of public safety or the existence of the interest of public safety requires. Neither the occurrence of public emergency nor the interest of public safety are secretive conditions or situations. Either of the situations would be apparent to a reasonable person.

29. The first step under Section 5(2) of the Act, therefore, is the occurrence of any public emergency or the existence of a public safety interest. Thereafter the competent authority under Section 5(2) of the Act is empowered to pass an order of interception after recording its satisfaction that it is necessary or expedient so to do in the interest of (i) sovereignty and integrity of India, (ii) the security of the State, (iii) friendly relations with foreign States, (iv) public order or (v) for preventing incitement to the commission of an offence. When any of the five situations mentioned above to the satisfaction of the competent authority require then the said authority may pass the order for interception of messages by recording reasons in writing for doing so.

30. The above analysis of Section 5(2) of the Act shows that so far the power to intercept messages/conversations is concerned the section clearly lays down the situations/conditions under which it can be exercised. But the substantive law as laid down in Section 5(2) of the Act must have procedural backing so that the exercise of power is fair and reasonable. The said procedure itself must be just, fair and reasonable. It has been settled by this Court in *Maneka Gandhi v. Union of India*¹¹ that "procedure which deals with the modalities of regulating, restricting or even rejecting a fundamental right falling within Article 21 has to be fair, not foolish, carefully designed to effectuate, not to subvert, the substantive right itself". Thus understood, "procedure" must rule out anything arbitrary, freakish or bizarre. A valuable constitutional right can be canalised only by civilised processes.

31. We are of the view that there is considerable force in the contention of Mr Rajinder Sachar, Mr Kapil Sibal and Dr Rajeev Dhavan that no procedure has been prescribed for the exercise of the power under Section 5(2) of the Act. It is not disputed that no rules have been framed under Section 7(2)(b) of the Act for providing the precautions to be taken for preventing the improper interception or disclosure of messages. In the absence of just and fair procedure for regulating the exercise of power under

¹¹ (1978) 1 SCC 248 · (1978) 2 SCR 621

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a Section 5(2) of the Act, it is not possible to safeguard the rights of the citizens guaranteed under Articles 19(1)(a) and 21 of the Constitution of India. The CBI investigation has revealed several lapses in the execution of the orders passed under Section 5(2) of the Act. Paras 21 and 22 of the report have already been quoted in the earlier part of this judgment.

32. The Second Press Commission in paras 164, 165 and 166 of its report has commented on the "tapping of telephones" as under:

"Tapping of Telephones

b 164. It is felt in some quarters, not without reason, that not infrequently the Press in general and its editorial echelons in particular have to suffer tapping of telephones.

c 165. Tapping of telephones is a serious invasion of privacy. It is a variety of technological eavesdropping. Conversations on the telephone are often of an intimate and confidential character. The relevant statute, i.e., Indian Telegraph Act, 1885, a piece of ancient legislation, does not concern itself with tapping. Tapping cannot be regarded as a tort because the law as it stands today does not know of any general right to privacy.

d 166. This is hardly a satisfactory situation. There are instances where apprehensions of disclosure of sources of information as well as the character of information may result in constraints on freedom of information and consequential drying up of its source. We, therefore, recommend that telephones may not be tapped except in the interest of national security, public order, investigation of crime and similar objectives, under orders made in writing by the Minister concerned or an officer of rank to whom the power in that behalf is delegated. The order should disclose reasons. An order for tapping of telephones should expire after three months from the date of the order. Moreover, within a period of six weeks the order should come up for review before a Board constituted on the lines prescribed in statutes providing for preventive detention. It should be for the Board to decide whether tapping should continue any longer. The decision of the Board should be binding on the Government. It may be added that the Minister or his delegates will be competent to issue a fresh order for tapping of the telephone if circumstances call for it. The Telegraph Act should contain a clause to give effect to this recommendation."

e 33. While dealing with Section 5(2) of the Act, the Second Press Commission gave the following suggestions regarding "public emergency" and "interest of public safety":

f "160. It may be noticed that the *public emergency* mentioned in the sub-section is not an objective fact. Some public functionary must determine its existence and it is on the basis of the existence of a *public emergency* that an authorised official should exercise the power of withholding transmission of telegrams. We think that the appropriate Government should declare the existence of the *public emergency* by a

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notification warranting the exercise of this power and it is only after the issue of such a notification that the power of withholding telegraphic messages should be exercised by the delegated authority. When such a notification is issued, the principal officer of the telegraph office can be required to submit to the District Magistrate, whom we consider to be the proper person to be the delegate for exercising this power, such telegrams brought for transmission which are likely to be prejudicial to the interest sought to be protected by the sub-section. Thereupon the District Magistrate should pass an order in writing withholding or allowing the transmission of the telegram. We are suggesting the safeguard of a prior notification declaring the existence of a public emergency because the power of interception is a drastic power and we are loath to leave the determination of the existence of a *public emergency* in the hands of a delegate.

We are of the view that whenever the power is exercised in the *interest of public safety*, it should, as far as possible, be exercised by the Minister concerned of the appropriate Government for one month at a time extendible by Government if the emergency continues. However, in exceptional circumstances the power can be delegated to the District Magistrate.

163. We also think that as soon as an order is passed by the District Magistrate withholding the transmission of a telegraphic message, it should be communicated to the Central or State Government, as the case may be, and also to the sender and the addressee of the telegram. The text of the order should be placed on the table of the respective State Legislatures after three months. We recommend that, as suggested by the Press Council of India in its annual report covering 1969, the officer in charge of a telegraph office should maintain a register giving particulars of the time of receipt, the sender and addressee of every telegram which he refers to the District Magistrate with recommendation of its withholding. Similarly, the District Magistrate should maintain a register of the time receipt, content and addressee of each telegram and record his decision thereon, together with the time of the decision. Data of this nature will help courts, if called upon, to determine the presence or absence of mala fide in the withholding of telegrams."

According to Mr Sachar the only way to safeguard the right of privacy of an individual is that there should be prior judicial scrutiny before any order for telephone-tapping is passed under Section 5(2) of the Act. He states that such judicial scrutiny may be ex parte. Mr Sachar contended that the judicial scrutiny alone would take away the apprehension of arbitrariness or unreasonableness of the action. Mr Kapil Sibal, on the other hand, has suggested various other safeguards — short of prior judicial scrutiny — based on the law on the subject in England as enacted by the Interception of the Communications Act, 1985.

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- a 34. We agree with Mr Sibal that in the absence of any provision in the statute, it is not possible to provide for prior judicial scrutiny as a procedural safeguard. It is for the Central Government to make rules under Section 7 of the Act. Section 7(2)(b) specifically provides that the Central Government may make rules laying down the precautions to be taken for preventing the improper interception or disclosure of messages. The Act was enacted in the year 1885. The power to make rules under Section 7 of the Act has been there for over a century but the Central Government has not thought it
- b proper to frame the necessary rules despite severe criticism of the manner in which the power under Section 5(2) has been exercised. It is entirely for the Central Government to make rules on the subject but till the time it is done the right to privacy of an individual has to be safeguarded. In order to rule out arbitrariness in the exercise of power under Section 5(2) of the Act and
- c till the time the Central Government lays down just, fair and reasonable procedure under Section 7(2)(b) of the Act, it is necessary to lay down procedural safeguards for the exercise of power under Section 5(2) of the Act so that the right to privacy of a person is protected.

35. We, therefore, order and direct as under:

- d 1. An order for telephone-tapping in terms of Section 5(2) of the Act shall not be issued except by the Home Secretary, Government of India (Central Government) and Home Secretaries of the State Governments. In an urgent case the power may be delegated to an officer of the Home Department of the Government of India and the State Governments not below the rank of Joint Secretary. Copy of the order shall be sent to the Review Committee concerned within one week of the passing of the order.
- e 2. The order shall require the person to whom it is addressed to intercept in the course of their transmission by means of a public telecommunication system, such communications as are described in the order. The order may also require the person to whom it is addressed to disclose the intercepted material to such persons and in such manner as
- f are described in the order.
3. The matters to be taken into account in considering whether an order is necessary under Section 5(2) of the Act shall include whether the information which is considered necessary to acquire could reasonably be acquired by other means.
- g 4. The interception required under Section 5(2) of the Act shall be the interception of such communications as are sent to or from one or more addresses, specified in the order, being an address or addresses likely to be used for the transmission of communications to or from, from one particular person specified or described in the order or one particular set of premises specified or described in the order.
- h 5. The order under Section 5(2) of the Act shall, unless renewed, cease to have effect at the end of the period of two months from the date

of issue. The authority which issued the order may, at any time before the end of two-month period renew the order if it considers that it is necessary to continue the order in terms of Section 5(2) of the Act. The total period for the operation of the order shall not exceed six months. a

6. The authority which issued the order shall maintain the following records:

- (a) the intercepted communications,
- (b) the extent to which the material is disclosed, b
- (c) the number of persons and their identity to whom any of the material is disclosed,
- (d) the extent to which the material is copied, and
- (e) the number of copies made of any of the material.

7. The use of the intercepted material shall be limited to the minimum that is necessary in terms of Section 5(2) of the Act. c

8. Each copy made of any of the intercepted material shall be destroyed as soon as its retention is no longer necessary in terms of Section 5(2) of the Act.

9. There shall be a Review Committee consisting of Cabinet Secretary, the Law Secretary and the Secretary, Telecommunication at the level of the Central Government. The Review Committee at the State level shall consist of Chief Secretary, Law Secretary and another member, other than the Home Secretary, appointed by the State Government. d

(a) The Committee shall on its own, within two months of the passing of the order by the authority concerned, investigate whether there is or has been a relevant order under Section 5(2) of the Act. Where there is or has been an order, whether there has been any contravention of the provisions of Section 5(2) of the Act. e

(b) If on an investigation the Committee concludes that there has been a contravention of the provisions of Section 5(2) of the Act, it shall set aside the order under scrutiny of the Committee. It shall further direct the destruction of the copies of the intercepted material. f

(c) If on investigation, the Committee comes to the conclusion that there has been no contravention of the provisions of Section 5(2) of the Act, it shall record the finding to that effect. g

36. The writ petition is disposed of. No costs.

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mode of proof as brought about by Act 21 of 1975 by virtue of the explanation to Section 10 would also become applicable to these transfers. The holdings of the members of the family unit had also to be clubbed together as stated in the Act, as amended. In other words, once the Amending Act, 1972 stood further amended w.e.f. 20-9-1975, there could be no question of still going by the Act as it stood before 20-9-1975 and the Tribunals were bound to apply Section 4(1) without the proviso and Section 10(1) as also together with the new explanation to Section 10(1).

28. Further, we agree with the reasoning of the Full Bench in *Madhukar case*² in this behalf. The Full Bench, in our view, rightly applied the principle enunciated by this Court in *Shamrao V. Parulekar v. District Magistrate, Thana*³. The relevant passage from the decision of this Court reads as follows:

"The rule is that when a subsequent Act amends an earlier one in such a way as to incorporate itself, or a part of itself, into the earlier, then the earlier Act must thereafter be read and construed (except where that would lead to a repugnancy, inconsistency or absurdity) as if the altered words had been written into the earlier Act with pen and ink and the old words scored out so that thereafter there is no need to refer to the Amending Act at all."

Applied to the present situation, the words "Amending Act, 1972" in Section 10(1) must in our view be read as "Amending Act, 1972 as amended by Amending Act, 1975". This disposes of the second contention raised by the respondent.

29. For the aforesaid conclusions, the reasons given by the High Court are not correct and the reasons in *Madhukar case*² decided by the Full Bench in 1986 are correct. The appeal is allowed and the judgment of the primary Tribunal as affirmed by the Appellate Tribunal is restored. No costs.

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(BEFORE S. SAGHIR AHMAD AND B.N. KIRPAL, JJ.)

Mr 'X'

Appellant;

Versus

HOSPITAL 'Z'

Respondents.

Civil Appeal No. 4641 of 1998[†], decided on September 21, 1998

A. Medical Ethics — Duty to maintain secrecy — Exception — Disclosure for protecting an identifiable person against health risk — Consequent to test of blood, for transfusing to another, testee found to be HIV(+) — Doctor conducting the test, disclosing the testee's HIV(+) status to testee's fiancée —

³ AIR 1952 SC 324 : 1952 SCR 683

[†] From the Judgment and Order dated 3-7-1998 of the National Consumer Disputes Redressal Commission at New Delhi in O.P. No. 88 of 1998

a Such disclosure although resulting in calling off of the marriage, held, permissible — Hence, a corresponding right to confidentiality, even if vested in the testee, held, was not enforceable against the doctor — Further held, such disclosure was not even violative of testee's right to privacy nor was violative of his right to marriage as the right to marry during continuance of communicable venereal disease or impotency has to be treated as merely a "suspended right" — Hippocratic oath — Enforceability — Held, not enforceable — International Code of Medical Ethics — Medical Council Act, 1956, Ss. 20-A and 33(m) — Code of Medical Ethics — Jurisprudence — "Right" — What is — When it may not have a correlative duty — Words and phrases — "Right" — b Constitution of India, Art. 21 — Right to privacy — Scope — European Convention on Human Rights, Art. 8 — Hindu law — Hindu Marriage Act, 1955, S. 13(1)(v) — Muslim Law — Dissolution of Muslim Marriages Act, 1939 — S. 2 — Parsi Marriage and Divorce Act, 1939, S. 32 — Divorce Act, 1869, S. 10 — Special Marriage Act, 1954, S. 27 — Marriage — Suspended right to marry — Held, not enforceable — Hence, infringement thereof, held, not c compensable by damages in torts or common law — Torts — Suspended right to marry — Infringement of, whether can be compensated by damages — Penal Code, 1860, Ss. 269 & 270

B. Constitution of India — Art. 21 — Conflict between fundamental rights of two parties — Right to privacy of one and right to healthy life of the other — Which one to prevail — In such a case, only that right which would advance public morality or public interest, held, would be enforceable — Judges' duty d towards morality, stated — Jurisprudence — Morality and the law — Judicial process — Moral aspects — Regard to by Judges

C. Constitution of India — Art. 21 — Right to privacy — Nature and scope of — Doctor-patient relationship — Duty to maintain confidentiality — Need for disclosure and invasion of right of privacy — Disclosure when justified — Right to privacy, held, not absolute

e D. Constitution of India — Art. 21 — Right to marry — Not an absolute right — All systems postulate healthy body and moral ethics — Person suffering from VD or HIV(+) will not have an enforceable right to marry till cured — It would remain a 'suspended right' — Jurisprudence — 'Right' — Suspended right

f E. Constitution of India — Art. 21 — Right to healthy life — Inherent in Art. 21 — Would justify breach of confidentiality or right to privacy of another person — Doctor or institution responsible for the disclosure would be acting in public interest in protection of rights and freedom of others

F. Constitution of India — Art. 16(1) — Right to government service cannot be denied to person suffering from AIDS

The appellant's blood was to be transfused to another and, therefore, sample thereof was tested at the respondents' hospital and he was found to be HIV(+). On g account of disclosure of this fact, the appellant's proposed marriage to one A which had been accepted, was called off. Moreover, he was severally criticised and was also ostracised by the community. The appellant approached the National Consumer Disputes Redressal Commission for damages against the respondents on the ground that the information required, under medical ethics, to be kept secret was disclosed illegally and that, therefore, the respondents were liable to pay damages to the appellant. The Commission dismissed the petition on the ground that the appellant h could seek his remedy in the civil court. Before the Supreme Court the appellant contended that the principle of "duty of care" applicable to persons in medical

profession included the duty to maintain confidentiality and that the said duty had a correlative right vested in the patient that whatever came to the knowledge of the doctor would not be divulged. The appellant added that for violating that duty as well as for violating the appellant's right to privacy, the respondents were liable for damages to the appellant. Rejecting the appellant's contentions, the Supreme Court

Held :

It is true that in the doctor-patient relationship, the most important aspect is the doctor's duty of maintaining secrecy. A doctor cannot disclose to a person any information regarding his patient which he has gathered in the course of treatment nor can the doctor disclose to anyone else the mode of treatment or the advice given by him to the patient. It is the basic principle of jurisprudence that every right has a correlative duty and every duty has a correlative right. But the rule is not absolute. It is subject to certain exceptions in the sense that a person may have a right but there may not be a correlative duty. The instant case falls within the exceptions.

(Paras 12 and 14)

"Right" is an interest recognised and protected by moral or legal rules. It is an interest the violation of which would be a legal wrong. Respect for such interest would be a legal duty. That is how Salmond has defined "right". In order, therefore, that an interest becomes the subject of a legal right, it has to have not merely legal protection but also legal recognition. The elements of a "legal right" are that the "right" is vested in a person and is available against a person who is under a corresponding obligation and duty to respect that right and has to act or forbear from acting in a manner so as to prevent the violation of the right. If, therefore, there is a legal right vested in a person, the latter can seek its protection against a person who is bound by a corresponding duty not to violate that right.

(Para 15)

The Hippocratic oath as such is not enforceable in a court of law as it has no statutory force. Medical information about a person is protected by the Code of Professional Conduct made by the Medical Council of India under Section 33(m) read with Section 20-A of the Act. The relevant provisions of the Code of Medical Ethics contain an exception to the general rule of confidentiality, inasmuch as it provides that the information may be disclosed in a court of law under the orders of the Presiding Judge. This is also the law in England. The Code of Medical Ethics also carves out an exception to the rule of confidentiality and permits the disclosure in the circumstances enumerated therein under which public interest would override the duty of confidentiality, particularly where there is an immediate or future health risk to others.

(Paras 16 to 18)

Hippocratic Collection (Corpus Hippocraticum); General Medical Council of Great Britain: Guidance on HIV Infection and AIDS, *referred to*

Therefore, the appellant's contention that the respondents were under a duty to maintain confidentiality on account of the Code of Medical Ethics formulated by the Indian Medical Council cannot be accepted as the proposed marriage carried with it the health risk to an identifiable person who had to be protected from being infected with the communicable disease from which the appellant suffered. The right to confidentiality, if any, vested in the appellant was not enforceable in the present situation.

(Para 19)

Right to privacy has been culled out of the provisions of Article 21 and other provisions of the Constitution relating to the Fundamental Rights read with the Directive Principles of State Policy. Right of privacy may, apart from contract, also arise out of a particular specific relationship which may be commercial, matrimonial, or even political. Doctor-patient relationship, though basically commercial, is, professionally, a matter of confidence and, therefore, doctors are morally and

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a ethically bound to maintain confidentiality. In such a situation, public disclosure of even true private facts may amount to an invasion of the right of privacy which may sometimes lead to the clash of one person's "right to be let alone" with another person's right to be informed. The right, however, is not absolute and may be lawfully restricted for the prevention of crime, disorder or protection of health or morals or protection of rights and freedom of others. (Paras 21, 27 and 28)

Kharak Singh v. State of U.P., AIR 1963 SC 1295 : (1964) 1 SCR 332; *Gobind v. State of M.P.*, (1975) 2 SCC 148 : 1975 SCC (Cri) 468; *Malak Singh v. State of P&H*, (1981) 1 SCC 420 : 1981 SCC (Cri) 169; *R. Rajagopal v. State of T.N.*, (1994) 6 SCC 632; *Jane Roe v. Henry Wade*, 410 US 113 : 35 L Ed 2d 147 (1973), *relied on*

b *Munn v. Illinois*, 94 US 113 : 24 L Ed 77 (1877); *Wolf v. Colorado*, 338 US 25 : 93 L Ed 1782 (1949), *referred to*

c Having regard to the fact that the appellant was found to be HIV(+), its disclosure would not be violative of either the rule of confidentiality or the appellant's right of privacy as A, whom the appellant was likely to marry, was saved in time by the disclosure, otherwise, she too would have been infected with the dreadful disease if the marriage had taken place and consummated. (Para 29)

d Mental and physical health is of prime importance in a marriage, as one of the objects of the marriage is the procreation of equally healthy children. That is why, in every system of matrimonial law, it has been provided that if a person was found to be suffering from any, venereal disease in a communicable form, it will be open to the other partner in the marriage to seek divorce. Reference, for instance, may be made to Section 13(1)(v) of the Hindu Marriage Act, 1955, Section 2 of Dissolution of Muslim Marriages Act, 1939, Section 32 of Parsi Marriage and Divorce Act, 1936, Section 10 of Indian Divorce Act, 1869 and Section 27 of Special Marriage Act, 1954. (Paras 32 to 36)

e The emphasis, therefore, in practically all systems of marriage is on a healthy body with moral ethics. Once the law provides "venereal disease" as a ground for divorce to either husband or wife, such a person who was suffering from that disease, even prior to the marriage cannot be said to have any right to marry so long as he is not fully cured of the disease. (Para 37)

f The appellant's contention that every young man or woman has a right to marry cannot be accepted in the absolute terms. If the person claiming a right to marry is suffering from any communicable venereal disease or is impotent so that marriage would be a complete failure or that his wife would seek divorce from him on that ground, that person is under a moral, as also legal, duty to inform the woman with whom the marriage is proposed that he was not physically healthy and that he was suffering from a disease which was likely to be communicated to her. In this situation, the right to marry and duty to inform about his ailment are vested in the same person. It is a right in respect of which a corresponding duty cannot be claimed as against some other person. Such a right, for these reasons also, would be an exception to the general rule that every "right" has a correlative "duty". Moreover, so long as the person is not cured of the communicable venereal disease or impotency, the right to marry cannot be enforced through a court of law and shall be treated to be a "suspended right". (Para 38)

g Moreover, if a person suffering from the dreadful disease "AIDS", knowingly marries a woman and thereby transmits infection to that woman, he would be guilty of offences indicated in Sections 269 and 270 of the Indian Penal Code. Therefore, the appellant cannot contend that the respondents, in this situation, should have maintained strict secrecy. (Paras 41 to 43)

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As a human being A must also enjoy, as she obviously is entitled to, all the human rights available to any other human being. This is apart from, and in addition to, the fundamental right available to her under Article 21. This right would positively include the right to be told that a person, with whom she was proposed to be married, was the victim of a deadly disease, which was sexually communicable. Since "right to life" includes right to lead a healthy life so as to enjoy all the faculties of the human body in their prime condition, the respondents, by their disclosure that the appellant was HIV(+), cannot be said to have, in any way, either violated the rule of confidentiality or the right of privacy. Moreover, where there is a clash of two Fundamental Rights, as in the instant case, namely, the appellant's right to privacy as part of right to life and A's right to lead a healthy life which is her Fundamental Right under Article 21, the right which would advance the public morality or public interest, would alone be enforced through the process of court, for the reason that moral considerations cannot be kept at bay and the Judges are not expected to sit as mute structures of clay in the hall known as the courtroom, but have to be sensitive, "in the sense that they must keep their fingers firmly upon the pulse of the accepted morality of the day". (Para 44)

Allen: *Legal Duties*, referred to

The patients suffering from the dreadful disease "AIDS" deserve full sympathy. They are entitled to all respect as human beings. Their society cannot, and should not be avoided, which otherwise, would have a bad psychological impact upon them. They have to have their avocation. Government jobs or service cannot be denied to them as has been laid down in some American decisions. But "sex" with them or the possibility thereof has to be avoided as otherwise they would infect and communicate the dreadful disease to others. The Court cannot assist such a person to achieve that object. (Para 45)

School Board of Nassau County, Florida v. Airline, 107 S Ct 1123 (1987); *Chalk v. USDC CD of Cal.*, (9th Circuit 1988) 840 2 F 2d 701; *Shuttleworth v. Broward Cty.*, (SDA Fla 1986) 639 F Supp 654; *Raytheon v. Fair Employment and Housing Commission, Estate of Chadbourne*, 261 Cal Rep 197 (1989), referred to

Appeal dismissed

H-M/T/20420/C

Advocates who appeared in this case :

Ms Meenakshi Arora, Advocate, for the Appellant;

Chronological list of cases cited

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2. 261 Cal Rep 197 (1989), <i>Raytheon v. Fair Employment and Housing Commission, Estate of Chadbourne</i>	310c-d
3. 107 S Ct 1123 (1987), <i>School Board of Nassau County, Florida v. Airline</i>	310c
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5. (SDA Fla 1986) 639 F Supp 654, <i>Shuttleworth v. Broward Cty.</i>	310c
6. (1981) 1 SCC 420 : 1981 SCC (Cri) 169, <i>Malak Singh v. State of P&H</i>	305g
7. (1975) 2 SCC 148 : 1975 SCC (Cri) 468, <i>Gobind v. State of M.P.</i>	305d-e, 305g
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10. 338 US 25 : 93 L Ed 1782 (1949), <i>Wolf v. Colorado</i>	305e
11. 94 US 113 : 24 L Ed 77 (1877), <i>Munn v. Illinois</i>	305e

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The Judgment of the Court was delivered by

a S. SAGHIR AHMAD, J.— Infringement of “suspended right to marry” cannot be legally compensated by damages either in torts or common law, is our answer to the problem raised in this appeal which is based on the peculiar facts of its own.

b 2. The appellant after obtaining the Degree of MBBS in 1987 from Jawaharlal Institute of Postgraduate Medical Education and Research, Chandigarh, completed his internship and junior residence at the same College. In June 1990, he joined the Nagaland State Medical and Health Service as Assistant Surgeon Grade I. Thereafter, the appellant joined the MD Pharmacology Course though he continued in the Nagaland State Service on the condition that he would resume his duties after completing the MD Course. In September 1991, the appellant joined the further Course of Diploma in Ophthalmology which he completed in April 1993. In August c 1993, he resumed his duties in the Nagaland State Health Service as Assistant Surgeon Grade I.

d 3. One Itokhu Yephthomi who was ailing from a disease which was provisionally diagnosed as aortic aneurism was advised to go to ‘Z’ Hospital at Madras and the appellant was directed by the Government of Nagaland to accompany the said patient to Madras for treatment. For the treatment of the above disease, Itokhu Yephthomi was posted for surgery on 31-5-1995 which, however, was cancelled due to shortage of blood. On 1-6-1995, the appellant and one Yehozhe who was the driver of Itokhu Yephthomi were asked to donate blood for the latter. Their blood samples were taken and the result showed that the appellant’s blood group was A(+ve). On the next date, e namely, on 2-6-1995, Itokhu Yephthomi was operated for aortic aneurism and remained in the Hospital till 10-6-1995 when he was discharged.

f 4. In August 1995, the appellant proposed marriage to one Ms ‘Y’ which was accepted and the marriage was proposed to be held on 12-12-1995. But the marriage was called off on the ground of blood test conducted at the respondents’ Hospital in which the appellant was found to be HIV(+). The appellant went again to the respondents’ Hospital at Madras where several tests were conducted and he was found to be HIV(+). Since the marriage had been settled but was subsequently called off, several people including members of the appellant’s family and persons belonging to his community became aware of the appellant’s HIV(+) status. This resulted in severe criticism of the appellant and he was ostracised by the community. The g appellant left Kohima (Nagaland) around 26-11-1995 and started working and residing at Madras.

h 5. The appellant then approached the National Consumer Disputes Redressal Commission for damages against the respondents, on the ground that the information which was required to be kept secret under medical ethics was disclosed illegally and, therefore, the respondents were liable to pay damages. The Commission dismissed the petition as also the application

for interim relief summarily by order dated 3-7-1998 on the ground that the appellant may seek his remedy in the civil court.

6. Learned counsel for the appellant has vehemently contended that the principle of "duty of care", as applicable to persons in the medical profession, includes the duty to maintain confidentiality and since this duty was violated by the respondents, they are liable in damages to the appellant. a

7. Duty to maintain confidentiality has its origin in the Hippocratic oath, which is an ethical code attributed to the ancient Greek physician Hippocrates, adopted as a guide to conduct by the medical profession throughout the ages and still used in the graduation ceremonies of many medical schools and colleges. Hippocrates lived and practised as a physician between the third and first centuries BC. He has been referred to by Plato as a famous Aesculapiad who had a philosophical approach to medicine. His manuscripts, the *Hippocratic Collection (Corpus Hippocraticum)*, contained the Hippocratic oath which is reproduced below: b

"I swear by 'Z' the physician and Aesculapius and health and all-heal and all the gods and goddesses that according to my ability and judgment I will keep this oath and this stipulation — to reckon him who taught me this art equally dear to me as my parents, to share my substance with him and relieve his necessities if required, to look upon his offspring in the same footing as my own brothers and to teach them this art if they shall wish to learn it without fee or stipulation and that by precept, lecture, and every other mode of instruction I will impart a knowledge of the art to my own sons and those of my teachers and to disciples bound by a stipulation and oath according to the law of medicine but to none others. I will follow that system of regimen which, according to my ability and judgment, I consider for the benefit of my patients, and abstain from whatever is deleterious and mischievous. I will give no deadly medicine to anyone if asked nor suggest any such counsel, and in like manner I will not give to a woman a pessary to produce abortion. With purity and with holiness I will pass my life and practise my art. I will not cut persons labouring under the stone but will leave this to be done by men who are practitioners of this work. Into whatever houses I enter, I will go into them for the benefit of the sick and will abstain from every voluntary act of mischief and corruption, and further, from the seduction of females or males, of freemen and slaves. Whatever, in connection with my professional practice, or not in connection with it, I see or hear, in the life of men, which ought not to be spoken of abroad, I will not divulge as reckoning that all such should be kept secret. While I continue to keep this oath unviolated, may it be granted to me to enjoy life and the practice of the art, respected by all men, in all times, but should I trespass and violate this oath, may the reverse be my lot." c

8. The Hippocratic oath consists of two parts. The first, or covenant, is the solemn agreement concerning the relationship of apprentice to teacher d

and the obligations enjoined on the pupil. The second part constitutes the ethical code.

- a 9. It is on the basis of the above that the International Code of Medical Ethics has also laid down as under:

"A physician shall preserve absolute confidentiality on all he knows about his patient even after his patient has died."

- b 10. Here, in this country, there is the Indian Medical Council Act, 1956 which controls the medical education and regulates the professional conduct. Section 20-A which was inserted by the Indian Medical Council (Amendment) Act, 1964 provides as under:

"20-A. *Professional conduct.*—(1) The Council may prescribe the standards of professional conduct and etiquette and a code of ethics for medical practitioners.

- c (2) Regulations made by the Council under sub-section (1) may specify which violations thereof shall constitute infamous conduct in any professional respect, that is to say, professional misconduct, and such provision shall have effect notwithstanding anything contained in any law for the time being in force."

At the same time, that is, by the same Amending Act, clause (m) was also introduced in Section 33 and this clause provides as under:

- d "33. *Power to make regulations.*—The Council may, with the previous sanction of the Central Government, make regulations generally to carry out the purposes of this Act, and, without prejudice to the generality of this power, such regulations may provide for—

(a)-(l) * * *

- e (m) the standards of professional conduct and etiquette and code of ethics to be observed by medical practitioners."

11. It is under these provisions that the Code of Medical Ethics has been made by the Indian Medical Council which, inter alia, provides as under:

"Do not disclose the secrets of a patient that have been learnt in the exercise of your profession. Those may be disclosed only in a court of law under orders of the Presiding Judge."

- f 12. It is true that in the doctor-patient relationship, the most important aspect is the doctor's duty of maintaining secrecy. A doctor cannot disclose to a person any information regarding his patient which he has gathered in the course of treatment nor can the doctor disclose to anyone else the mode of treatment or the advice given by him to the patient.

- g 13. It is contended that the doctor's duty to maintain secrecy has a correlative right vested in the patient that whatever has come to the knowledge of the doctor would not be divulged and it is this right which is being enforced through these proceedings.

- h 14. It is the basic principle of jurisprudence that every right has a correlative duty and every duty has a correlative right. But the rule is not absolute. It is subject to certain exceptions in the sense that a person may

have a right but there may not be a correlative duty. The instant case, as we shall presently see, falls within the exceptions.

15. "Right" is an interest recognised and protected by moral or legal rules. It is an interest the violation of which would be a legal wrong. Respect for such interest would be a legal duty. That is how Salmond has defined "right". In order, therefore, that an interest becomes the subject of a legal right, it has to have not merely legal protection but also legal recognition. The elements of a "legal right" are that the "right" is vested in a person and is available against a person who is under a corresponding obligation and duty to respect that right and has to act or forbear from acting in a manner so as to prevent the violation of the right. If, therefore, there is a legal right vested in a person, the latter can seek its protection against a person who is bound by a corresponding duty not to violate that right. a
b

16. The Hippocratic oath as such is not enforceable in a court of law as it has no statutory force. Medical information about a person is protected by the Code of Professional Conduct made by the Medical Council of India under Section 33(m) read with Section 20-A of the Act. The relevant provisions of the Code of Medical Ethics have already been reproduced above which contain an exception to the general rule of confidentiality, inasmuch as it provides that the information may be disclosed in a court of law under the orders of the Presiding Judge. This is also the law in England where it is provided that the exceptions to this rule permit disclosure with the consent, or in the best interests, of the patient, in compliance with a court order or other legally enforceable duty and, in very limited circumstances, where the public interest so requires. Circumstances in which the public interest would override the duty of confidentiality could, for example, be the investigation and prosecution of serious crime or where there is an immediate or future (but not a past and remote) health risk to others. c
d
e

17. The General Medical Council of Great Britain in its guidance on HIV infection and AIDS has provided as under:

"When diagnosis has been made by a specialist and the patient after appropriate counselling, still refuses permission for the general practitioner to be informed of the result, that request for privacy should be respected. The only exception would be when failure to disclose would put the health of the health-care team at serious risk. All people receiving such information must consider themselves to be under the same obligations of confidentiality as the doctor principally responsible for the patient's care. Occasionally the doctor may wish to disclose a diagnosis to a third party other than a health-care professional. The Council think that the only grounds for this are when there is a serious and identifiable risk to a specific person, who, if not so informed would be exposed to infection.... *A doctor may consider it a duty to ensure that any sexual partner is informed regardless of the patient's own wishes.*" f
g

(emphasis supplied) h

18. Thus, the Code of Medical Ethics also carves out an exception to the rule of confidentiality and permits the disclosure in the circumstances enumerated above under which public interest would override the duty of confidentiality, particularly where there is an immediate or future health risk to others.

19. The argument of the learned counsel for the appellant, therefore, that the respondents were under a duty to maintain confidentiality on account of the Code of Medical Ethics formulated by the Indian Medical Council cannot be accepted as the proposed marriage carried with it the health risk to an identifiable person who had to be protected from being infected with the communicable disease from which the appellant suffered. The right to confidentiality, if any, vested in the appellant was not enforceable in the present situation.

20. Learned counsel for the appellant then contended that the appellant's right of privacy has been infringed by the respondents by disclosing that the appellant was HIV(+) and, therefore, they are liable in damages. Let us examine this contention.

21. Right to privacy has been culled out of the provisions of Article 21 and other provisions of the Constitution relating to the Fundamental Rights read with the Directive Principles of State Policy. It was in this context that it was held by this Court in *Kharak Singh v. State of U.P.*¹ that police surveillance of a person by domiciliary visits would be violative of Article 21 of the Constitution. This decision was considered by Mathew, J. in his classic judgment in *Gobind v. State of M.P.*² in which the origin of "right to privacy" was traced and a number of American decisions, including *Munn v. Illinois*³, *Wolf v. Colorado*⁴ and various articles were considered and it was laid down ultimately, as under: (SCC p. 157, para 31)

"31. Depending on the character and antecedents of the person subjected to surveillance as also the objects and the limitation under which surveillance is made, it cannot be said surveillance by domiciliary visits would always be unreasonable restriction upon the right of privacy. Assuming that the fundamental rights explicitly guaranteed to a citizen have penumbral zones and that the right to privacy is itself a fundamental right, that fundamental right must be subject to restriction on the basis of compelling public interest."

22. *Kharak Singh v. State of U.P.*¹ and *Gobind v. State of M.P.*² came to be considered again by this Court in *Malak Singh v. State of P&H*⁵ and the view taken earlier on the right of privacy was reiterated.

1 AIR 1963 SC 1295 : (1964) 1 SCR 332

2 (1975) 2 SCC 148 : 1975 SCC (Cri) 468

3 94 US 113 : 24 L Ed 77 (1877)

4 338 US 25 : 93 L Ed 1782 (1949)

5 (1981) 1 SCC 420 : 1981 SCC (Cr) 169

23. In another classic judgment rendered by Jeevan Reddy, J., in *R. Rajagopal v. State of T.N.*⁶ the right of privacy vis-à-vis the right of the Press under Article 19 of the Constitution was considered and in the research-oriented judgment, it was laid down, inter alia, as under: (SCC pp. 649-50, para 26) a

"26. (1) The right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by Article 21. It is a 'right to be let alone'. A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child-bearing and education among other matters. None can publish anything concerning the above matters without his consent — whether truthful or otherwise and whether laudatory or critical. If he does so, he would be violating the right to privacy of the person concerned and would be liable in an action for damages. Position may, however, be different, if a person voluntarily thrusts himself into controversy or voluntarily invites or raises a controversy." b c

24. In an American decision, *Jane Roe v. Henry Wade*⁷ the Supreme Court of United States said that:

"Although the Constitution of the USA does not explicitly mention any right of privacy, the United States Supreme Court recognizes that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution, and that the roots of that right may be found in the First Amendment, in the Fourth and Fifth Amendments, in the penumbras of the Bill of Rights, in the Ninth Amendment, and in the concept of liberty guaranteed by the first section of the Fourteenth Amendment and that the 'right to privacy is not absolute'." d e

25. Reference may, at this stage, be made to Article 8 of the European Convention on Human Rights which defines this right as follows:

"(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others." f

(emphasis supplied) g

26. As one of the basic Human Rights, the right of privacy is not treated as absolute and is subject to such action as may be lawfully taken for the prevention of crime or disorder or protection of health or morals or protection of rights and freedoms of others. h

6 (1994) 6 SCC 632

7 410 US 113 : 35 L Ed 2d 147 (1973)

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27. Right of privacy may, apart from contract, also arise out of a particular specific relationship which may be commercial, matrimonial, or
a even political. As already discussed above, doctor-patient relationship, though basically commercial, is, professionally, a matter of confidence and, therefore, doctors are morally and ethically bound to maintain confidentiality. In such a situation, public disclosure of even true private facts may amount to an invasion of the right of privacy which may sometimes lead to the clash of one person's "right to be let alone" with
b another person's right to be informed.

28. Disclosure of even true private facts has the tendency to disturb a person's tranquillity. It may generate many complexes in him and may even lead to psychological problems. He may, thereafter, have a disturbed life all through. In the face of these potentialities, and as already held by this Court in its various decisions referred to above, the right of privacy is an essential
c component of the right to life envisaged by Article 21. The right, however, is not absolute and may be lawfully restricted for the prevention of crime, disorder or protection of health or morals or protection of rights and freedom of others.

29. Having regard to the fact that the appellant was found to be HIV(+), its disclosure would not be violative of either the rule of confidentiality or
d the appellant's right of privacy as Ms 'Y', with whom the appellant was likely to be married was saved in time by such disclosure, or else, she too would have been infected with the dreadful disease if the marriage had taken place and consummated.

30. We may now examine the right based on confidentiality in the
e context of marriage.

31. Marriage is the sacred union, legally permissible, of two healthy bodies of opposite sexes. It has to be mental, psychological and physical union. When two souls thus unite, a new soul comes into existence. That is how, life goes on and on on this planet.

32. Mental and physical health is of prime importance in a marriage, as
f one of the objects of the marriage is the procreation of equally healthy children. That is why, in every system of matrimonial law, it has been provided that if a person was found to be suffering from any (*sic*), including venereal disease, in a communicable form, it will be open to the other partner in the marriage to seek divorce. Reference, for instance, may be made to Section 13(1)(v) of the Hindu Marriage Act, 1955 which provides as
g under:

"13. (1) Any marriage solemnized, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party—

(i)-(iv) * * *

- h (v) *Has been suffering from venereal disease in a communicable form.*"

(emphasis supplied)

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33. So also Section 2 of the Dissolution of Muslim Marriages Act, 1939 sets out that if the husband is suffering from a virulent venereal disease, a woman married under Muslim law to such person shall be entitled to obtain a decree for dissolution of her marriage. a

34. Under the Parsi Marriage and Divorce Act, 1936, one of the grounds for divorce set out in Section 32 is that the defendant has, since the marriage, infected the plaintiff with venereal disease.

35. Under the Indian Divorce Act, 1869, the grounds for dissolution of a marriage have been set out in Section 10 which provides that a wife may petition for dissolution if her husband was guilty of incestuous adultery, bigamy with adultery or of rape, sodomy or bestiality. b

36. Under Section 27 of the Special Marriage Act, 1954 the party to a marriage has been given the right to obtain divorce if the other party to whom he or she was married was suffering from venereal disease in a communicable form. c

37. The emphasis, therefore, in practically all systems of marriage is on a healthy body with moral ethics. Once the law provides the "venereal disease" as a ground for divorce to either husband or wife, such a person who was suffering from that disease, even prior to the marriage cannot be said to have any right to marry so long as he is not fully cured of the disease. If the disease, with which he was suffering, would constitute a valid ground for divorce, was concealed by him and he entered into marital ties with a woman who did not know that the person with whom she was being married was suffering from a virulent venereal disease, that person must be enjoined from entering into marital ties so as to prevent him from spoiling the health and, consequently, the life of an innocent woman. d

38. The contention of the learned counsel that every young man or, for that matter, a woman, has a right to marry cannot be accepted in the absolute terms in which it is being contended. Having regard to the age and the biological needs, a person may have a right to marry but this right is not without a duty. If that person is suffering from any communicable venereal disease or is impotent so that marriage would be a complete failure or that his wife would seek divorce from him on that ground, that person is under a moral, as also legal duty, to inform the woman with whom the marriage is proposed that he was not physically healthy and that he was suffering from a disease which was likely to be communicated to her. In this situation, the right to marry and duty to inform about his ailment are vested in the same person. It is a right in respect of which a corresponding duty cannot be claimed as against some other person. Such a right, for these reasons also, would be an exception to the general rule that every "right" has a correlative "duty". Moreover, so long as the person is not cured of the communicable venereal disease or impotency, the right to marry cannot be enforced through a court of law and shall be treated to be a "suspended right". e

39. There is yet another aspect of the matter. f

g

h

'X' v. HOSPITAL 'Z' (Saghir Ahmad, J.)

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40. Sections 269 and 270 of the Indian Penal Code provide as under:

a "269. *Negligent act likely to spread infection of disease dangerous to life.*—Whoever unlawfully or negligently does any act which is, and which he knows or has reason to believe to be, likely to spread the infection of any disease, dangerous to life, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

b 270. *Malignant act likely to spread infection of disease dangerous to life.*—Whoever maliciously does any act which is, and which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."

c 41. These two sections spell out two separate and distinct offences by providing that if a person, negligently or unlawfully, does an act which he knew was likely to spread the infection of a disease, dangerous to life, to another person, then, the former would be guilty of an offence, punishable with imprisonment for the term indicated therein. Therefore, if a person suffering from the dreadful disease "AIDS", knowingly marries a woman and thereby transmits infection to that woman, he would be guilty of offences indicated in Sections 269 and 270 of the Indian Penal Code.

d 42. The above statutory provisions thus impose a duty upon the appellant not to marry as the marriage would have the effect of spreading the infection of his own disease, which obviously is dangerous to life, to the woman whom he marries apart from being an offence.

e 43. Can the appellant, in the face of these statutory provisions, contend that the respondents, in this situation, should have maintained strict secrecy? We are afraid, the respondents' silence would have made them *particeps criminis*.

f 44. Ms 'Y', with whom the marriage of the appellant was settled, was saved in time by the disclosure of the vital information that the appellant was HIV(+). The disease which is communicable would have been positively communicated to her immediately on the consummation of marriage. As a human being, Ms 'Y' must also enjoy, as she obviously is entitled to, all the Human Rights available to any other human being. This is apart from, and in addition to, the Fundamental Right available to her under Article 21, which, as we have seen, guarantees "right to life" to every citizen of this country. This right would positively include the right to be told that a person, with whom she was proposed to be married, was the victim of a deadly disease, which was sexually communicable. Since "right to life" includes right to lead a healthy life so as to enjoy all the faculties of the human body in their prime condition, the respondents, by their disclosure that the appellant was HIV(+), cannot be said to have, in any way, either violated the rule of confidentiality or the right of privacy. Moreover, where there is a clash of two Fundamental Rights, as in the instant case, namely, the appellant's right to privacy as part of right to life and Ms 'Y's right to lead a healthy life which is her Fundamental Right under Article 21, the

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right which would advance the public morality or public interest, would alone be enforced through the process of court, for the reason that moral considerations cannot be kept at bay and the Judges are not expected to sit as mute structures of clay in the hall known as the courtroom, but have to be sensitive, "in the sense that they must keep their fingers firmly upon the pulse of the accepted morality of the day". (See: Allen: *Legal Duties*)

45. "AIDS" is the product of undisciplined sexual impulse. This impulse, being a notorious human failing if not disciplined, can afflict and overtake anyone howsoever high or, for that matter, how low he may be in the social strata. The patients suffering from the dreadful disease "AIDS" deserve full sympathy. They are entitled to all respect as human beings. Their society cannot, and should not be avoided, which otherwise, would have a bad psychological impact upon them. They have to have their avocation. Government jobs or service cannot be denied to them as has been laid down in some American decisions. (See: *School Board of Nassau Country, Florida v. Airline*⁸; *Chalk v. USDC CD of Cal.*⁹; *Shuttleworth v. Broward Cty.*¹⁰; *Raytheon v. Fair Employment and Housing Commission, Estate of Chadbourne*¹¹). But "sex" with them or the possibility thereof has to be avoided as otherwise they would infect and communicate the dreadful disease to others. The Court cannot assist that person to achieve that object.

46. For the reasons stated above, the appeal is without merits and is, consequently, dismissed.

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(BEFORE S.B. MAJMUDAR AND M. JAGANNADHA RAO, JJ.)

BABY .. Appellant;

Versus

TRAVANCORE DEVASWOM BOARD
AND OTHERS .. Respondents.

Civil Appeals Nos. 5502-04 of 1998[†], decided on November 6, 1998

A. Constitution of India — Art. 227 — Powers of High Court under Art. 227 are in addition to the powers of revision under other legislation — Kerala Land Reforms Act, 1963 (1 of 1964), S. 103 providing for, High Court powers of revision where land revenue authority "either decided erroneously, or failed to decide, any question of law" — Held, though non-consideration of relevant documents including relevance of certain judicial proceedings not sufficient grounds for interference under S. 103 the High Court still has powers under Art. 227 to quash tribunal orders if based on findings of fact arrived at by non-

8 107 S Ct 1123 (1987)

9 (9th Circuit 1988) 840 2 F 2d 701

10 (SDA Fla 1986) 639 F Supp 654

11 261 Cal Rep 197 (1989)

[†] From the Judgment and Order dated 7-4-1997 of the Kerala High Court in C.R.Ps. Nos. 599-601 of 1990

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(BEFORE R.C. LAHOTI, C.J. AND ASHOK BHAN, J.)

DISTRICT REGISTRAR AND COLLECTOR,
HYDERABAD AND ANOTHER

Appellants;

Versus

CANARA BANK AND OTHERS

Respondents.

Civil Appeals Nos. 6350-74 of 1997[†] with No. 7079 of 2004[‡],
decided on November 1, 2004

A. Constitution of India — Arts. 19(1)(a) & (d) and 21 — Right to privacy of the person — Held, exists apart from right to privacy with respect to places such as the home

B. Constitution of India — Arts. 19(1)(a) & (d) and 21 — Right to privacy of the person — Right to freedom from unreasonable search and seizure — Scope — Confidentiality of bank documents, telephone calls and correspondence — Held, State cannot have unrestricted access to inspect and seize or make roving inquiries into all bank records relating to a person, without any reliable information before it prior to such inspection — Documents or copies of documents of the customer which are in the bank must continue to remain confidential vis-à-vis the person, even if they are no longer at the customer's house and have been voluntarily sent to a bank — Search, taking of notes or extracts or seizure of the said documents would amount to a breach of confidentiality and be violative of privacy rights of customers of the bank, unless there is some probable or reasonable cause or basis, to be recorded in writing, or materials before the authority making or authorising the search, taking of notes or extracts or seizure — However, cautioned that various provisions in the Income Tax Act, 1961 (S. 132, etc.) or CrPC (Ss. 91, 165 & 166) which authorised search and seizure were not ipso facto being invalidated herein; in any case said provisions had been extensively considered by the courts and had been held to be valid — Banker and Customer — Confidentiality in respect of banking transactions — Nature of banker and customer relationship — Stamp Act, 1899 — S. 73 (as amended by A.P. Act 17 of 1986) — Constitutionality

C. Constitution of India — Arts. 19(1)(a) & (d) and 21 — Right to privacy — Scope — Held, in case of a matter being part of public records, including court records, the right of privacy cannot be claimed

D. Constitution of India — Arts. 19(1)(a) & (d) and 21 — Right to privacy of the house and person — Right to freedom from unreasonable search and seizure — Stamp Act, 1899 — S. 73 (as amended by A.P. Act 17 of 1986) — Constitutionality of — Said section permits inspection of documents which are in private custody, empowers invasion of the home without any safeguards as to probable or reasonable cause or requirement of reasonable basis or materials, or recording of reasons for the belief necessitating the search or seizure — Power of impounding documents can be exercised under said section without giving notice or a chance to make

[†] From the Judgment and Order dated 27-9-1996 of the Andhra Pradesh High Court in WPs Nos. 10300 of 1989, 14320, 14924, 15456, 16595, 17724, 4948, 5330 and 5373 of 1988, 366, 4475 and 13347 of 1989, 1157 of 1991, 16733 and 18632 of 1993, 21872, 29007 and 29052 of 1995, 1670, 3165, 3242, 6370, 6533, 6782 and 6783 of 1996

[‡] Arising out of SLP (C) No. 11607 of 2001 : (1997) 4 Andh LT 118

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a good the deficit stamp duty, except in case of documents in custody of a bank (no reasons having been given for making the distinction), and the power to adjudicate upon need for impounding documents in all cases vested in the person authorised — Moreover, due to the lack of safeguards, the possibility of an exercise of the said powers proving to be absolutely disproportionate to the purpose sought to be achieved cannot be ruled out — Therefore, held, said section violates the right to privacy both of the house and the person and is unconstitutional

b [Ed.: See also Art. 19(1)(a), '(c)(2)(vii) 8. Other constituents of Art. 19(1)(a) — Privacy, Right to', pp. 111 et seq., '(c)(2)(vii) 9. Subjective and psychological content of Art. 19(1)(a)', p. 113, and Art. 21, '(c)(3) Privacy, Right to', pp. 635 et seq., and see also under Art. 21, '(d)(2) "Personal liberty" — Meaning and scope — Particular Instances and Statutes', pp. 763 et seq. in Vol. 6, *Complete Digest of Supreme Court Cases*, 2nd Edn.]

c E. Constitution of India — Art. 14 — Discretionary power — Particular instances — If said power guided and controlled in Stamp Act, 1899, S. 73 (as amended by A.P. Act 17 of 1986) — Constitutionality — Held, said S. 73 suffers from the vice of excessive delegation, since (i) there are no guidelines as to the persons who may be authorised by the Collector, and (ii) there is no requirement of reasons being recorded by the Collector or the person authorised, for his belief necessitating search, and (iii) the power of impounding documents can be exercised without giving notice or a chance to make good the deficit stamp duty, except in case of documents in custody of a bank (no reasons having been given for making the distinction), and the power to adjudicate upon need for impounding documents in all cases being vested in the person authorised

d F. Constitution of India — Art. 14 — Discretionary power — Valid delegation of — Test and requirements — Held, guidelines or principles or norms for exercise of discretionary power, essential

e [Ed.: See also Art. 14, '(d)(2)(vi) Valid delegation of discretionary power — Test and requirements of' and '(d)(2)(iv) Necessarily discriminatory, discretionary power if' in *Complete Digest of Supreme Court Cases*, Vol. 5, pp. 32 et seq.]

Amended S. 73 of the Stamp Act — Infirmities

f A discretionary power may not necessarily be a discriminatory power but where a statute confers a power on an authority to decide matters of moment without laying down any guidelines or principles or norms, the power has to be struck down as being violative of Article 14. (Para 57)

Air India v. Nergesh Meerza, (1981) 4 SCC 335 : 1981 SCC (L&S) 599, *relied on*

g A bare reading of Section 73 as substituted by A.P. Act 17 of 1986 indicates the infirmities with which the provision suffers. The provision empowers "any person" authorised in writing by the Collector to have access to documents in private custody or custody of a public officer without regard to the fact whether the documents are sought to be used before any authority competent to receive evidence or whether such document would ever be voluntarily produced or brought before a public officer during the performance of any of his specified functions in his capacity as such (contrary to the scheme of the rest of the Stamp Act, 1899 even as applicable to the State of Andhra Pradesh). The power is capable of being exercised by such persons at all reasonable times and it is not preceded by any requirement of reasons being recorded by the Collector or the person authorised, for his belief necessitating search. The provision suffers from the vice of excessive delegation as there are no guidelines in the Act as to the

persons who may be authorised. The State must clearly define the officers by designation or state that the power can be delegated to officers not below a particular rank in the official hierarchy, as may be designated by the State. The person authorised has been vested with authority to impound the document. It is only in case of documents in custody of any bank that an exception has been carved out for giving a 30 days' previous notice to the bank to make good the deficit stamp duty before seizing and impounding the document. Not only is there no valid reason — none pointed out either in the pleadings or at the hearing — for drawing the distinction between a bank and other public office or any person having custody of document, even in the case of a bank, the power to adjudicate upon the need for impounding the document has been vested in the person authorised. (Paras 16, 12, 54, 46, 58, 3 and 43)

The A.P. Amendment permits inspection being carried out by the Collector by having access to the documents which are in *private custody* i.e. custody other than that of a public officer. It is clear that this provision empowers invasion of the home of the person in whose possession the documents "tending" to or leading to the various facts stated in Section 73 are in existence. Section 73 being one without any safeguards as to probable or reasonable cause or reasonable basis or materials violates the right to privacy both of the house and of the person. Under the garb of the power conferred by Section 73 the person authorised may go on a rampage searching house after house i.e. residences of the persons or the places used for the custody of documents. The possibility of any wild exercise of such power may be remote, but then on the framing of Section 73 the possibility cannot be ruled out. Any number of documents may be inspected, may be seized and may be removed and at the end the whole exercise may turn out to be an exercise in futility. The exercise may prove to be absolutely disproportionate to the purpose sought to be achieved and, therefore, a reasonable nexus between stringency of the provision and the purpose sought to be achieved ceases to exist. This deficiency pointed out by the High Court and highlighted by the respondents in the Supreme Court has not been removed even by the rules framed therefor. (Paras 55, 58, 59, 54 and 16)

It cannot be denied that there is an element of confidentiality between a bank and its customers in relation to the latter's banking transactions. However, in the case of a matter being part of public records, including court records, the right of privacy cannot be claimed. Our cheques are not merely negotiable instruments but yet the world can learn a vast amount about us by knowing how and with whom we have spent our money. Same is the position when we use the telephone or post a letter. The State cannot have unrestricted access to inspect and seize or make roving inquiries into all bank records, without any reliable information before it prior to such inspection. Once it is accepted that the right to privacy deals with persons, the documents or copies of documents of the customer which are in a bank, must continue to remain confidential vis-à-vis the person, even if they are no longer at the customer's house and have been voluntarily sent to a bank. Therefore, unless there is some probable or reasonable cause or basis, to be recorded in writing, or material before the Collector for reaching an opinion that the documents in the possession of the bank tend to secure any stamp duty or to prove or to lead to the discovery of any fraud or omission in relation to any duty, the search or the taking of notes or extracts cannot be valid. The above safeguards must necessarily be read into the provision relating to search, inspection and seizure so as to save it from any unconstitutionality. When public records in the Sub-Registrar's Office or a bank or for that matter any other public

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a office are inspected for the purposes referred to in the impugned Section 73, the public officer may indeed have no objection to such inspection. But, as in the present case, in the context of a bank, which either holds the private documents of its customers or copies of such private documents, the disclosure of the contents of the documents by the bank would amount to a breach of confidentiality and would, therefore, be violative of privacy rights of its customers. (Paras 53, 54, 45, 46 and 48; and 18 to 40)

b However, it is not being said that any law which is not on the lines of the US Right to Financial Privacy Act, 1978 (Pub L. No. 95-630) is invalid. Indian laws such as Section 132, etc. of the Income Tax Act, 1961; or Sections 91, 165 and 166 of the Criminal Procedure Code, 1973 as to search and seizure have been extensively considered by the courts in India and have been held to be valid.

(Para 48)

c *Kharak Singh v. State of U.P.*, (1964) 1 SCR 332 : (1963) 2 Cri LJ 329; *Gobind v. State of M.P.*, (1975) 2 SCC 148 : 1975 SCC (Cri) 468; *R. Rajagopal v. State of T.N.*, (1994) 6 SCC 632; *People's Union for Civil Liberties v. Union of India*, (1997) 1 SCC 301; 'X' v. *Hospital 'Z'*, (1998) 8 SCC 296; *People's Union for Civil Liberties v. Union of India*, (2003) 4 SCC 399; *Sharda v. Dharmpal*, (2003) 4 SCC 493; *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248, *relied on*

d *Semayne's case*, (1603) 5 Coke's Rep 91a : 77 ER 194 (KB); *Entick v. Carrington*, (1765) 19 Howells' State Trials 1029 : 95 ER 807 : 2 Wils KB 275; *Boyd v. United States*, 116 US 616 : 29 L Ed 746 (1886); *Olmstead v. United States*, 277 US 438 : 72 L Ed 944 (1928) (dissenting opinion of Brandeis, J.); *Griswold v. State of Connecticut*, 381 US 479 : 14 L Ed 2d 510 (1965); *Warden v. Heyden*, 387 US 294 (1967); *Katz v. United States*, 389 US 347 : 19 L Ed 2d 576 (1967); *Terry v. Ohio*, 392 US 1 (1968); *Thornburgh v. American College of O&G*, 476 US 747 (1986); *Whalen v. Roe*, 429 US 589 : 51 L Ed 2d 64 (1977); *United States v. Orito*, 413 US 139 (1973); *Stanley v. Georgia*, 394 US 557 : 22 L Ed 2d 542 (1969), *discussed*

e *United States v. Miller*, 425 US 435 (1976), *disapproved*
Richard Alexander: "Privacy, Banking Records and Supreme Court: A Before and After Look at Miller", South West University L. Rev. (1978), Vol. 10 (pp. 13-33); Polyviou G. Polyviou: *Search and Seizure* (Duckworth, 1982), pp. 67 to 71; La Fave: *Search and Seizure* (1978); Jackson and Tushnet: (2001) *Comparative Constitutions Law* 404; Note, *Government Access to Bank Records*, (1974) 83 YALE LAW JOURNAL 1439; *A Bank Customer has no Reasonable Expectation of Privacy of Bank Records: US v. Miller*, 14 San Diego L. Rev. 414 (1977), *referred to*

f Section 73 of the Stamp Act as amended in its application to the State of Andhra Pradesh by Andhra Pradesh Act 17 of 1986 is therefore ultra vires the Constitution. (Para 60)

g G. Stamp Act, 1899 — S. 73 (as amended by A.P. Act 17 of 1986) and Ss. 33 to 35, 38, 43, 48 and 62 — Constitutionality of said S. 73 — Non-payment of duty — Penalties imposed for — Held, possessing a document not duly stamped is not by itself an offence — Penalties for non-payment of duty include not receiving a document not duly stamped in evidence, impounding of said document, recovery of duty and penalty, and criminal prosecution under S. 62 — Further held, availability of these provisions adequately protects the interest of revenue — Therefore, the sweeping powers of search and seizure provided under the amended S. 73, which due to the lack of any safeguards could in any case be exercised in a manner disproportionate to the purpose sought to be achieved, cannot be justified
h either on ground of being a penalty for non-payment of duty or protection of the interest of revenue — Constitution of India — Art. 14 — Discretionary

power — Principle of proportionality — Power granted open to use but disproportionate to purpose to be achieved — Held, invalid

(Paras 58, 59 and 15)

[Ed.: See also Art. 14, '(d)(2)(xii) Discretionary power — Principle of proportionality', Vol. 5, pp. 57 et seq. and ADMINISTRATIVE LAW, '7. (31) Judicial review — Proportionality', Vol. I, pp. 193 et seq., *Complete Digest of Supreme Court Cases*, 2nd Edn.]

H. Stamp Act, 1899 — Ss. 33, 34, 35 and 38 — Power to impound documents and to recover duty with or without penalty — Held, has to be construed strictly and would be sustained only when falling within the four corners and letter of the law — Criminal Procedure Code, 1973 — S. 104 — Passports Act, 1967 — S. 10 — Constitution of India — Arts. 19(1)(a) & (d) and 21 — Right to privacy

I. Stamp Act, 1899 — S. 62 — Nature of offence and requirements for prosecution under — Held, a minor offence punishable with fine only and not cognizable, liable to be condoned by payment of duty and penalty on the document — No prosecution can be launched except in case of a criminal intention to evade the stamp law or in case of a fraud, that too after having given person liable to be proceeded against an opportunity of being heard

(Paras 15, 58 and 59)

J. Taxation — Generally — Taxing statutes — Nature of — Held, taxing statutes cannot be classed as (a) remedial statutes and (b) statutes which have come to be enacted on demand of permanent public policy — This is the case since taxing statutes operate to impose burdens upon the public

(Para 10)

K. Constitution of India — Part III — Generally — Pre-constitutional laws — Held, must conform to provisions of Part III — Stamp Act, 1899 — Constitutionality of

(Para 44)

L. Stamp Act, 1899 — Generally — Nature of — Held, cannot be held to have been enacted solely for protection of revenue and for purpose of being enforced solely at the instance of revenue officials

(Para 13)

M. Interpretation of Statutes — Particular statutes and provisions — Taxing statutes — Principles for interpretation of — Held, are strictly construed — There is no scope for equity or judiciousness if the letter of law is clear and unambiguous — However, benefit of any ambiguity or conflict in different provisions of such a statute shall go to the citizen — Stamp Act, 1899 — Interpretation of

(Para 10)

N. Interpretation of Statutes — Particular statutes and provisions — Remedial statutes and statutes which have come to be enacted on demand of the permanent public policy — Held, generally receive a liberal interpretation

(Para 10)

Dowlatram Harji v. Vitho Radhoji, ILR (1880) 5 Bom 188 (FB); *Jai Devi v. Gokal Chand*, (1906) 7 Punj LR 428 (FB); *Munshi Ram v. Harnam Singh*, AIR 1934 Lah 637 (1); *L. Puran Chand v. Emperor*, AIR 1942 Lah 257, approved

Surajmull Nagoremull v. Triton Insurance Co. Ltd., AIR 1925 PC 83 : 52 IA 126, relied on

O. Constitution of India — Arts. 19(1)(a) & (d) and 21 — Right to privacy — Source of, nature and scope — Held, is the right to be let alone and has been implied in the articles listed — Every person has a right to safeguard the privacy of his own and includes the right to privacy of the person and the house — List of elements of the right to privacy enumerated by Mathew, J. in *Gobind case*, (1975) 2 SCC 148, para 24, is not exhaustive

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— Right to privacy in any event would necessarily have to go through a process of case-by-case development (Paras 39, 37 and 40)

- a P. Constitution of India — Arts. 19(1)(a) & (d) and 21 — Right to privacy — Illegitimate intrusions into — Test for — Relevance to right to freedom from unreasonable search and seizure — Held, exclusion from illegitimate intrusions into privacy depends on the nature of the right being asserted and the way in which it is brought into play — It is at this point that the context becomes crucial, to inform substantive judgment — Further held, said factors are quite relevant whenever there is invasion of the right to privacy by way of searches and seizures at the instance of the State

(Para 31)

- c Q. Constitution of India — Arts. 19(1)(a) & (d) and 21 — Right to privacy — Legitimate intrusions into by (1) legislative provisions, (2) administrative/executive orders, and (3) judicial orders — Tests for — Held, intrusions in case of (1) must be tested on touchstone of reasonableness as guaranteed by the Constitution and for that purpose the court can go into proportionality of intrusion vis-à-vis purpose sought to be achieved — Intrusions in case of (2) have to be reasonable having regard to facts and circumstances of the case, and can be reasonable only if it has a reasonable basis or reasonable materials to support it — Intrusions in case of (3) by issue of judicial warrants are permissible only if the court has sufficient reason to believe that the search or seizure is warranted, and court must keep in mind extent of search and seizure necessary for protection of the particular State interest — Warrantless searches, in the rare cases that they are permissible, must be conducted in good faith, intended to preserve evidence or to prevent sudden danger to person or property

(Paras 31, 34 and 39)

- e R. Constitution of India — Arts. 19(1)(a) & (d) and 21 — Right to freedom from unreasonable search and seizure — Illegality and reasonableness of search or seizure — Relationship between — Warrantless searches — When permissible — Held, one does not necessarily imply the other, though it is often the case that one implies the other (Para 31)

[Ed.: See also Art. 19(1)(a), '(c)(2)(vii) 8. Other constituents of Art. 19(1)(a) — Privacy, Right to', pp. 111 et seq., and Art. 21, '(c)(3) Privacy, Right to', pp. 635 et seq., and see also under Art. 21, '(d)(2) "Personal liberty" — Meaning and scope — Particular instances and statutes', pp. 763 et seq. in Vol. 6, *Complete Digest of Supreme Court Cases*, 2nd Edn.]

- f S. Constitution of India — Arts. 21, 19 and 14 — Right to personal liberty and privacy — Scope — "Procedure established by law" — Meaning — Threefold test to be satisfied by any law interfering with personal liberty of a person — Role of test propounded by Art. 14 — Held, as the test propounded by Art. 14 pervades Art. 21 as well, the law and procedure authorising interference with personal liberty and right of privacy must also be right and just and fair and not arbitrary, fanciful or oppressive — If procedure prescribed does not satisfy the requirement of Art. 14 it would be no procedure at all within the meaning of Art. 21

[Ed.: See also Art. 21, '(e)(3) Justiciability of "procedure established by law"', pp. 776 et seq. in Vol. 6, *Complete Digest of Supreme Court Cases*, 2nd Edn.]

- g T. Constitution of India — Arts. 21, 19 and 14 — Right to personal liberty — Scope — Held, said right also means life free from encroachments unsustainable in law

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U. Constitution of India — Arts. 21 and 19 — Expression “personal liberty” in Art. 21 — Scope — Protection under Art. 19 — Held, the expression “personal liberty” is of the widest amplitude and covers a variety of rights which go to constitute the personal liberty of man and some of them have been raised to status of distinct fundamental rights and given additional protection under Art. 19 (Paras 56 and 55)

[Ed.: See also Art. 21, ‘(d)(1) “Personal liberty” — Meaning and scope’, pp. 744 et seq. in Vol. 6, *Complete Digest of Supreme Court Cases*, 2nd Edn.]

Kharak Singh v. State of U.P., (1964) 1 SCR 332 : (1963) 2 Cri LJ 329; *Gobind v. State of M.P.*, (1975) 2 SCC 148 : 1975 SCC (Cri) 468; *R. Rajagopal v. State of T.N.*, (1994) 6 SCC 632; *People’s Union for Civil Liberties v. Union of India*, (1997) 1 SCC 301; ‘X’ v. Hospital ‘Z’, (1998) 8 SCC 296; *People’s Union for Civil Liberties v. Union of India*, (2003) 4 SCC 399; *Sharda v. Dharmpal*, (2003) 4 SCC 493; *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248, *relied on*

Olmstead v. United States, 277 US 438 : 72 L Ed 944 (1928) (dissenting opinion of Brandeis, J.); *Griswold v. State of Connecticut*, 381 US 479 : 14 L Ed 2d 510 (1965); *Munn v. Illinois*, 94 US 113 : 24 L Ed 77 (1877); *Wolf v. Colorado*, 338 US 25 : 93 L Ed 1782 (1949); *Jane Roe v. Henry Wade*, 410 US 113 (1973), *referred to*

M.P. Sharma v. Satish Chandra, 1954 SCR 1077 : 1954 Cri LJ 865, *clarified and limited*
R. v. Jeffries, (1994) 1 NZLR 290 (CA); *Gobind v. State of M.P.*, (1975) 2 SCC 148 : 1975 SCC (Cri) 468, *clarified*

Tribe, Lawrence H.: *American Constitutional Law* (1988), 2nd Edn., Ch. 15, pp. 1306-1307, *relied on*

V. Constitution of India — Arts. 19(1)(a) & (d) and 21 — Right to privacy — Right to freedom from unreasonable search and seizure — History of, in England, the US and India traced — Right to privacy of the home as a personal right distinct from a right to property in the US (Paras 18, 24 and 33)

Semayne’s case, (1603) 5 Coke’s Rep 91a : 77 ER 194 (KB); *Entick v. Carrington*, (1765) 19 Howells’ State Trials 1029 : 95 ER 807 : 2 Wils KB 275; *Boyd v. United States*, 116 US 616 : 29 L Ed 746 (1886); *Olmstead v. United States*, 277 US 438 : 72 L Ed 944 (1928) (dissenting opinion of Brandeis, J.); *Griswold v. State of Connecticut*, 381 US 479 : 14 L Ed 2d 510 (1965); *Warden v. Heyden*, 387 US 294 (1967); *Katz v. United States*, 389 US 347 : 19 L Ed 2d 576 (1967); *Terry v. Ohio*, 392 US 1 (1968); *Thornburgh v. American College of O&G*, 476 US 747 (1986); *Whalen v. Roe*, 429 US 589 : 51 L Ed 2d 64 (1977); *United States v. Orto*, 413 US 139 (1973); *Stanley v. Georgia*, 394 US 557 : 22 L Ed 2d 542 (1969), *discussed*

Fourth Amendment to the US Constitution; Article 12, Universal Declaration of Human Rights (1948); Article 17, International Covenant of Civil and Political Rights; Article 8, European Convention on Human Rights; Canadian Charter of Rights and Freedoms; Section 21, New Zealand Bill of Rights; Amar, Akhil: *Constitution and Criminal Procedure, First Principles*, Yale University Press (1997), p. 183, fn 42; Fried: *Privacy* (1968), Yale Law Journal 475 (at p. 477); (1976) 64 Cal L. Rev. 1447; Tribe, Lawrence H.: *American Constitutional Law* (1988), 2nd Edn., Ch. 15, pp. 1391-92, 1400 and 1412, *referred to*

W. Stamp Act, 1899 — Ss. 73 and 33 — Scope of S. 73 — “Public officer having in his custody any registers, books, records, papers, documents or proceedings” — Nature of documents included under — Meaning of “public office” in S. 33 — Held, confined only to “public documents”, that is documents in custody of a public officer which would necessarily be either public documents or public records of private documents — Purpose for and circumstances in which inspection may be authorised (Paras 3 and 43)

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X. Stamp Act, 1899 — Ss. 31 and 33 — Nature of — Held, under either section the documents concerned should have been voluntarily produced — Production thereof cannot be compelled (Para 12)

a Appeals dismissed D-M/ATZ/30745/C

Advocates who appeared in this case :

Ms K. Amareswari, Senior Advocate (T.V. Ratnam, K. Subba Rao, O.S.G. Prasuna, K. Ram Kumar, Pradheep Dewan, Dr. Manmohan Sharma, Promod B. Agarwala, Ms Praveena Gautam, Ms Anupam Dhingra, S. Srinivasan, A. Ranganadhan, Buddy Ranganadhan, A.V. Rangam, P.P. Singh, S.N. Bhat, Y. Prabhakara Rao, Y. Rajagopal Rao, V. Sudeer, M.B. Rama Subba Raju, Balaji Srinivasan, Ms S. Sunita, Devendra Singh and Ghan Shyam, Advocates) for the appearing parties.

- b Chronological list of cases cited on page(s)
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 - e 16. 392 US 1 (1968), *Terry v. Ohio* 514a-b
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 - f 20. (1964) 1 SCR 332 : (1963) 2 Cri LJ 329, *Kharak Singh v. State of U.P.* 516d-e, 516g-h, 517g
 21. 1954 SCR 1077 : 1954 Cri LJ 865, *M.P. Sharma v. Satish Chandra* 516a
 22. 338 US 25 : 93 L Ed 1782 (1949), *Wolf v. Colorado* 516f-g
 23. AIR 1942 Lah 257, *L. Puran Chand v. Emperor* 509g-h
 24. AIR 1934 Lah 637 (1), *Munshi Ram v. Harnam Singh* 509g
 25. 277 US 438 : 72 L Ed 944 (1928), *Olmstead v. United States* 513a-b, 517c
 - g 26. AIR 1925 PC 83 : 52 IA 126, *Surajmull Nagoremull v. Triton Insurance Co. Ltd.* 509d-e
 27. (1906) 7 Punj LR 428 (FB), *Jai Devi v. Gokal Chand* 509f
 28. 116 US 616 : 29 L Ed 746 (1886), *Boyd v. United States* 511d-e, 513a-b
 29. ILR (1880) 5 Bom 188 (FB), *Dowlatram Harji v. Viitho Radhoji* 508f-g
 30. 94 US 113 : 24 L Ed 77 (1877), *Munn v. Illinois* 516d-e
 31. (1765) 19 Howells' State Trials 1029 : 95 ER 807 : 2 Wils KB 275, *Entick v. Carrington* 511c-d, 511e, 512g
 - h 32. (1603) 5 Coke's Rep 91a : 77 ER 194 (KB), *Semayne's case* 511a-b

The Judgment of the Court was delivered by

R.C. LAHOTI, C.J.— Leave granted in SLP (C) No. 11607 of 2001.

2. Section 73 of the Indian Stamp Act, 1899 as incorporated by Andhra Pradesh Act 17 of 1986, by amending the Central Act in its application to the State, has been struck down by the High Court of Andhra Pradesh as ultra vires the provisions of the Indian Stamp Act as also of Article 14 of the Constitution. The District Registrar and Collector, Registration and Stamps Department, Hyderabad and the Assistant Registrar have come up in appeal by special leave. a

Relevant statutory provisions under the Central Act

3. Section 73 of the Indian Stamp Act (before the insertion of the text under the impugned State legislation in its applicability to the State of Andhra Pradesh) reads as under:

“73. Every public officer having in his custody any registers, books, records, papers, documents or proceedings, the inspection whereof may tend to secure any duty, or to prove or lead to the discovery of any fraud or omission in relation to any duty, shall at all reasonable times permit any person authorised in writing by the Collector to inspect for such purpose the registers, books, papers, documents and proceedings, and to take such notes and extracts as he may deem necessary, without fee or charge.” c

The term “public officer” is not defined in Section 73 nor in the interpretation clause. However, the term “public office” is found to have been used in Section 33. Sub-section (3) of Section 33 provides as under: d

“33. (3) For the purposes of this section, in cases of doubt,—

(a) the State Government may determine what offices shall be deemed to be public offices; and e

(b) the State Government may determine who shall be deemed to be persons in charge of public offices.”

The term “public officer having in his custody any registers, etc.” as occurring in Section 73 can be defined by having regard to the expression “public office” as occurring in Section 33. The Central legislation including Section 73 took care to see that the power to inspect was confined only to documents in the custody of public officer which documents would necessarily be either public documents or public record of private documents. The purpose of inspection is clearly defined. It is permissible to have inspection carried out only in these circumstances: (i) when it may tend to secure any duty, or (ii) when it may tend to prove any fraud or omission in relation to any duty, and (iii) when it may tend to lead to the discovery of any fraud or omission in relation to any duty. f

The State amendments (1986)

4. A.P. Act 17 of 1986 has amended the Indian Stamp Act, 1899 in its application to the State of Andhra Pradesh. The Act was reserved by the Government of A.P. on 24-4-1986 for the consideration and assent of the President and received such assent on 17-7-1986 which was published in the Andhra Pradesh Gazette for general information on 22-7-1986. Out of the g

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- a several amendments made by A.P. Act 17 of 1986, the relevant one for our purpose is Section 73 as substituted in place of the original Section 73 of the Indian Stamp Act by Section 6 of A.P. Act 17 of 1986. The same is reproduced hereunder:

“6. For Section 73, of the principal Act, the following section shall be substituted, namely—

- b “73. (1) Every public officer or any person having in his custody any registers, books, records, papers, documents or proceedings, the inspection whereof may attend to secure any duty, or to prove or lead to the discovery of any fraud or omission in relation to any duty, shall at all reasonable times permit any person authorised in writing by the Collector to enter upon any premises and to inspect for such purposes the registers, books, records, papers, documents and proceedings, and to take such notes and extracts as he may deem necessary, without fee or charge and if necessary to seize them and impound the same under proper acknowledgement:

- c Provided that such seizure of any registers, books, records, papers, documents or other proceedings, in the custody of any bank be made only after a notice of thirty days to make good the deficit stamp duty is given.

- d *Explanation.*—For the purposes of this proviso ‘bank’ means a banking company as defined in Section 5 of the Banking Regulation Act, 1949 and includes the State Bank of India, constituted by the State Bank of India Act, 1955 a subsidiary bank as defined in the State Bank of India (Subsidiary Banks) Act, 1959, a corresponding new bank as defined in the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 and in the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1980, a regional rural bank established under the Regional Rural Banks Act, 1976, the Industrial Development Bank of India established under the Industrial Development Bank of India Act, 1964, National Bank for Agriculture and Rural Development established under the National Bank for Agriculture and Rural Development Act, 1981, the Life Insurance Corporation of India established under the Life Insurance Corporation Act, 1956. The Industrial Finance Corporation of India established under the Industrial Finance Corporation Act, 1948, and such other financial or banking institution owned, controlled or managed by a State Government or the Central Government, as may be notified in this behalf by the Government.

- g (2) Every person having in his custody or maintaining such registers, books, records, papers, documents or proceedings shall, when so required by the officer authorised under sub-section (1), produce them before such officer and at all reasonable times permit such officer to inspect them and take such notes and extracts as he may deem necessary.

- h (3) If, upon such inspection, the person so authorised is of opinion that any instrument is chargeable with duty and is not duly stamped, he shall require the payment of the proper duty or the amount required to make up the same from the person liable to pay the stamp duty; and in

case of default the amount of the duty shall be recovered as an arrear of land revenue.' "

5. The Statement of Objects and Reasons states that the Government have been considering for quite some time the question of plugging the loopholes in the Indian Stamp Act, 1899 in its application to this State so as to arrest the leakage of stamp revenue and also to augment the stamp revenue in the State. The State of Andhra Pradesh in doing so was inspired by the amendments made in the State of Karnataka. As to Section 73 the SOR states:

"As per Section 73 of the said Act, the Collector or any person authorised by him shall inspect any public office and the public officer having in his custody any registers, books, records etc. shall permit him to take copies of extracts of those records. However, the inspecting officer cannot seize the defictly stamped documents and impound the same during inspection. On account of this loophole, the inspecting officers are not able to seize and impound the defictly stamped documents and collect the deficit stamp revenue. It has therefore been decided to empower the inspecting officers to enter any premises and seize the documents and impound them."

(For a detailed Statement of Objects and Reasons see the Andhra Pradesh Gazette, Extraordinary, Part IV-A dated 20-3-1986, pp. 9-11.)

The A.P. State Rules (1986)

6. In exercise of the powers conferred by Section 75 of the Indian Stamp Act, 1899 and of all other powers hereunto enabling and in supersession of the earlier rules the Governor of Andhra Pradesh framed rules for the collection of duties secured in the course of inspection under Section 73 of the Indian Stamp (Andhra Pradesh Amendment) Act, 1986 which rules came into force on the 16th day of August, 1986. The relevant part of the Rules is extracted and reproduced hereunder:

"1. In these rules unless the context otherwise requires—

(a) 'Act' means, the Indian Stamp (A.P. Amendment) Act, 1986.

(b) 'Inspector General of Registration and Stamps' includes the person authorised in writing by him as the Collector appointed under Section 73 of the Act to exercise the powers under that section.

(c) 'Head of Office' means, the head of the office inspected by the Inspector General of Registration and Stamps under Section 73.

(d) 'Section' means a section of the Act.

(e) 'Any premises' includes any public office or any place where registers, books, documents etc. are kept under the custody of a person the inspection whereof may tend to secure any duty.

2. (1) The notes of inspection under Section 73 shall be sent to the head of office with a copy to the head of the district office, if the office inspected is subordinate to him, or with a copy to the head of the department concerned, if the office inspected is the district or regional office.

(2) The first reports of compliance shall be sent to the Inspector General of Registration and Stamps, immediately on receipt of the notes of inspection by the head of office, with a copy to the head of the district office

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concerned, if the office inspected is subordinate to him or with a copy to the head of the department, if the office inspected is a district or regional office.

a 3. When deficitly stamped documents are detected during the course of inspection the following procedure shall be followed—

b (i) The Inspector General of Registration and Stamps or the person authorised by him shall seize and impound such documents and after giving an opportunity to the parties levy deficit duties if any, without penalty and collect the same from the persons liable to pay under sub-section (3) of Section 73 and add the following certificate on the original document—

* * *

c (ii) If the parties fail to pay the deficit duty under sub-rule (i), it shall be collected by the head of office. The amounts so collected shall be remitted to the Treasury under the following head of account by means of a challan.

* * *

d (iii) If the parties failed to pay such deficit duties, the Inspector General of Registration and Stamps shall forward the original document to the Collector exercising powers under Section 48 of the Indian Stamp Act, 1899 over the area for effecting recovery by coercive process. After the amounts are so collected, the procedure laid down in sub-rule (i) shall be followed.

(iv) In the absence of original documents, and on the basis of copies of such documents, if they are found to be not duly stamped, the procedure for collection of the duty as laid down in sub-rule (iii) shall be followed:

e 4. If the parties are aggrieved by the levy of duties they may apply to the Inspector General of Registration and Stamps for revision before the certificate prescribed under Rule 3 is added.

5.-6. * * *

(For full text of Rules see the Andhra Pradesh Gazette, Rules supplement to Part II, Extraordinary dated 14-8-1986, pp. 4-77.)

The challenge

f 7. There were 25 writ petitions filed in the High Court. Out of these, 11 were by different banks. A few writ petitions were filed by institutions, corporate or incorporate bodies and a few were filed by sugar companies. The grievances arose because the documents executed between private parties and received and retained in the custody of the bank in ordinary course of their loan-advancing transactions were inspected and then the banks were served with a request to remit the amount of deficit duty on the documents inspected and to recover the same from the parties concerned. The grievance of the sugar companies is that in the course of their business they were entering into agreements with the sugarcane-growers selling sugarcane to the sugar companies in compliance with the provisions of the A.P. Sugarcane Control Order, 1965 in the pro forma prescribed by the Control Order. Several agreements entered into in the prescribed pro forma were treated as unstamped (though they were not liable to be stamped, in the

submission of sugar companies) and therefore, were sought to be impounded. The grievance of private persons is that the documents in their possession are sought to be inspected, impounded and levied with duty though they were not tendered in evidence nor produced before any public office. a

8. A perusal of the judgment of the High Court shows that in holding the impugned Section 73 of the Act ultra vires the Constitution and other provisions of the Indian Stamp Act, the High Court has arrived at four findings: firstly, that the amended Section 73 is inconsistent with the other provisions of the Act; secondly, that the provision is violative of the principles of natural justice; thirdly, the provision is arbitrary and unreasonable and hence violative of Article 14 of the Constitution; and fourthly, there are no guidelines provided for the exercise of power by the authorised persons under the amended Section 73 which is either arbitrary and unreasonable or vitiated on account of excessive delegation of statutory powers. b c

9. During the course of hearing Mrs K. Amareswari, the learned Senior Counsel for the appellants has vehemently attacked the correctness of the impugned judgment submitting that the A.P. Amendments are directed towards safeguarding the revenue of the State and striking at the evil of stamp duty evasion, and therefore the validity of such reasonable legislation was not liable to be questioned as unconstitutional. On the other hand, the learned counsel appearing for the respondents have defended the judgment of the High Court by reiterating the same grounds of attack on the constitutional validity of the impugned amendment as were urged in the High Court; of course enlarging the reach of submissions by developing the dimensions thereof. We will deal with the submissions so made before us. d e

Nature of stamp legislation

10. The Stamp Act is a piece of fiscal legislation. Remedial statutes and statutes which have come to be enacted on demand of the permanent public policy generally receive a liberal interpretation. However, fiscal statutes cannot be classed as such, operating as they do to impose burdens upon the public and are, therefore, construed strictly. A few principles are well settled while interpreting a fiscal law. There is no scope for equity or judiciousness if the letter of law is clear and unambiguous. The benefit of any ambiguity or conflict in different provisions of statute shall go to the subject. In *Dowlatram Harji v. Vitho Radhoji*¹ the Full Bench indicated the need for balancing the harshness which would be inflicted on the subjects by implementation of the stamp law as against the advantage which would result in the form of revenue to the State; the latter may not be able to compensate the discontent which would be occasioned amongst the subjects. f g

11. The legislative competence of the State of Andhra Pradesh to amend and modify the Indian Stamp Act, a Central legislation, in its applicability to the State of Andhra Pradesh, has not been questioned and rightly so in view of the State enactment having been reserved for the consideration of the h

¹ 11LR (1880) 5 Bom 188 (FB)

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a President and having received his assent under Article 254(2) of the Constitution. The attack is on the ground of unreasonableness, inconsistency and excessive delegation of powers and also on account of drastic powers having been conferred on executive authorities without laying down guidelines.

b 12. The provisions of Section 29 providing for the persons by whom duties are payable have been left untouched. So is with Section 31 dealing with "adjudication as to proper stamp" which confers power on the Collector to adjudicate upon the duty with which a document shall be chargeable, though such document may or may not have been executed. The scheme of Section 31 involves an element of voluntariness. The person seeking adjudication must have brought the document to the Collector and also applied for such adjudication. The document cannot be compelled to be brought before him by the Collector. Section 33 confers power of c impounding a document not duly stamped subject to the document being produced before an authority competent to receive evidence or a person in charge of a public office. It is necessary that the document must have been produced or come before such authority or person in charge in performance of its functions. The document should have been voluntarily produced. At the same time, Section 36 imposes an embargo on the power to impound vesting d in the authority competent to receive evidence, by providing that it cannot question the admission of document in evidence once it has been admitted. None of these provisions have been amended by the State of Andhra Pradesh.

e 13. In *Surajmull Nagoremull v. Triton Insurance Co. Ltd.*² Their Lordships of the Privy Council made it clear that the provisions of the Stamp Act cannot be held to have been framed solely for the protection of revenue and for the purpose of being enforced solely at the instance of the revenue officials.

f 14. Power to impound a document and to recover duty with or without penalty thereon has to be construed strictly and would be sustained only when falling within the four corners and letter of the law. This has been the consistent view of the courts. Illustratively, three decisions may be referred. In *Jai Devi v. Gokal Chand*³ a document not duly stamped was produced in the court by the plaintiff along with the plaint but the suit came to be dismissed for non-prosecution. It was held by the Full Bench that the document annexed with the plaint cannot be said to have been produced in the court in evidence and the court had no jurisdiction to call for the same and impound it. In *Munshi Ram v. Harnam Singh*⁴ the suit was compromised on the date of first hearing and decree was passed based on the compromise. g The original entry in a *bahi* was not put in evidence and, therefore, the Special Bench held it was not liable to be impounded. In *L. Puran Chand v. Emperor*⁵ the power to impound was sought to be exercised after the decision

2 AIR 1925 PC 83 : 52 IA 126

3 (1906) 7 Punj LR 428 (FB)

4 AIR 1934 Lah 637 (1)

5 AIR 1942 Lah 257

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in the suit and when the document alleged to be not duly stamped had already been directed to be returned as not proved though it was not physically returned. The Special Bench held that the document was not available for being impounded. a

15. Though an instrument not duly stamped may attract criminal prosecution under Section 62 of the Act but Parliament and the legislature have both treated it to be a minor offence punishable with fine only and not cognizable. Here again it is well settled that such offence is liable to be condoned by payment of duty and penalty on the document and no prosecution can be launched except in the case of a criminal intention to evade the stamp law or in case of a fraud and that too after giving the person liable to be proceeded against, an opportunity of being heard. b

16. A bare reading of Section 73 as substituted by A.P. Act 17 of 1986 indicates the infirmities with which the provision suffers. The provision empowers any person authorised in writing by the Collector to have access to documents in private custody or custody of a public officer without regard to the fact whether the documents are sought to be used before any authority competent to receive evidence and without regard to the fact whether such document would ever be voluntarily produced or brought before a public officer during the performance of any of his specified functions in his capacity as such. The power is capable of being exercised by such persons at all reasonable times and it is not preceded by any requirement of the reasons being recorded by the Collector or the person authorised for his belief necessitating search. The person authorised has been vested with authority to impound the document. It is only in case of documents in custody of any bank that an exception has been carved out for giving a 30 days' previous notice to the bank to make good the deficit stamp duty before seizing and impounding the document. Not only is there no valid reason — none pointed out either in the pleadings nor at the hearing — for drawing the distinction between a bank and other public office or any person having custody of document, even in the case of a bank, the power to adjudicate upon the need for impounding the document has been vested in the person authorised. The provision does not lay down any guidelines for determining the person who can be authorised by the Collector to exercise the powers conferred by Section 73. c
d
e

17. It is submitted on behalf of the respondents (writ petitioners in the High Court) that the impugned Section 73 (as applicable in Andhra Pradesh) interferes with the personal liberty of citizens inasmuch as it allows an intrusion into the privacy and property of the citizens. The instruments may have been kept in the residential accommodation of a person or may have been kept at a place belonging to the person and meant for the custody of the documents and both such places can be entered into by any person authorised in writing by the Collector. It was submitted that the provision is unreasonable and cannot be sustained on the constitutional anvil. f
g
h

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Right of privacy qua search and seizure — debate in other countries

18. The right to privacy and the power of the State to “search and seize”
a have been the subject of debate in almost every democratic country where fundamental freedoms are guaranteed. History takes us back to *Semayne’s case*⁶ decided in 1603 where it was laid down that “Every man’s house is his castle.” One of the most forceful expressions of the above maxim was that of William Pitt in the British Parliament in 1763. He said: “The poorest man may in his cottage bid defiance to all the force of the Crown. It may be frail
b — its roof may shake — the wind may blow through it — the storm may enter, the rain may enter — *but the King of England cannot enter* — all his force dare not cross the threshold of the ruined tenement.”

19. When John Wilkes attacked not only governmental policies but the King himself, pursuant to general warrants, State officers raided many homes and other places connected with John Wilkes to locate his controversial
c pamphlets. Entick, an associate of Wilkes, sued the State officers because agents had forcibly broken into his house, broke locked desks and boxes, and seized many printed charts, pamphlets and the like. In a landmark judgment in *Entick v. Carrington*⁷ Lord Camden declared the warrant and the behaviour as subversive “of all the comforts of society” and the issuance of a warrant for the seizure of *all* of a person’s *papers* and not those only alleged
d to be criminal in nature was “contrary to the genius of the law of England”. Besides its general character, the warrant was, according to the Court, had inasmuch as it was not issued on a showing of *probable cause* and no record was required to be made of what had been seized. In USA, in *Boyd v. United States*⁸, US at p. 626, the US Supreme Court said that the great *Entick*⁷
e judgment was “one of the landmarks of English liberty. ... one of the permanent monuments of the British Constitution”.

20. The Fourth Amendment in the US Constitution was drafted after a long debate on the English experience and secured freedom from unreasonable searches and seizures. It said:

- “The right of the people to be secure in their person, houses, *papers*, and effects, against unreasonable searches and seizures, shall not be violated and
f no warrants shall issue, but upon *probable cause*, supported by oath or affirmation, and *particularly describing* the place to be searched, and the persons or things to be seized.”

Article 12 of the Universal Declaration of Human Rights (1948) refers to privacy and it states:

- “No one shall be subjected to arbitrary interference with his privacy,
g family, home or correspondence nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.”

h 6 (1603) 5 Coke’s Rep 91a : 77 ER 194 (KB)
7 (1765) 19 Howells’ State Trials 1029 : 95 ER 807 : 2 Wils KB 275
8 116 US 616 : 29 L Ed 746 (1886)

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Article 17 of the International Covenant of Civil and Political Rights (to which India is a party), refers to privacy and states that:

"No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home and correspondence, nor to unlawful attacks on his honour and reputation." a

21. The European Convention on Human Rights, which came into effect on 3-9-1953, also states in Article 8:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence." b

2. There shall be no interference by a public authority except such as is in accordance with law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the protection of health or morals or for the protection of the rights and freedoms of others." c

22. The Canadian Charter of Rights and Freedoms declares:

"Everyone has the right to be secure against *unreasonable* search and seizure."

23. The New Zealand Bill of Rights declares in Section 21 that "everyone has the right to be secure against unreasonable search or seizure, whether of the person, property or correspondence or otherwise". d

24. Though the US Constitution contains a specific provision in the Fourth Amendment against "unreasonable search and seizure", it does not contain any express provision protecting the "right to privacy". However, the US Supreme Court has culled out the "right of privacy" from the other rights guaranteed in the US Constitution. In India, our Constitution does not contain a specific provision either as to "privacy" or even as to "unreasonable" search and seizure, but the right to privacy has, as we shall presently show, been spelt out by our Supreme Court from the provisions of Article 19(1)(a) dealing with freedom of speech and expression, Article 19(1)(d) dealing with right to freedom of movement and from Article 21 which deals with right to life and liberty. We shall first refer to the case-law in US relating to the development of the right of privacy as these cases have been adverted to in the decisions of this Court. e

Privacy right in US initially concerned "property"

25. The American courts trace the "right to privacy" to the English common law which treated it as a right associated with "right to property". It was declared in *Entick v. Carrington*⁷ (1765) that the right of privacy protected trespass against property. Lord Camden observed: g

"The great end for which men entered into society was to secure their property. That right is preserved sacred and incommunicable in all instances where it has not been taken away or abridged by some public law for the good of the whole.... By the laws of England, every invasion of private property, be it even so minute, is a trespass. No man can set h

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foot upon my ground without my licence but he is liable to an action though the damage be nothing.”

- a This aspect of privacy as a property right was accepted by the US Supreme Court in *Boyd v. United States*⁸, US at p. 627 and other cases.

From right to property to right to person

- b 26. After four decades, in *Olmstead v. United States*⁹, which was a case of wire-tapping or electronic surveillance and where there was no actual physical invasion, the majority held that the action was *not* subject to Fourth Amendment restrictions. But, in his dissent, Justice Brandeis stated that the amendment protected the right to privacy which meant “the right to be let alone”, and its purpose was “to secure conditions favourable to the pursuit of happiness”, while recognising “the significance of man’s spiritual nature, of his feelings and of his intellect”; the right sought “to protect Americans in their beliefs, their thoughts, their emotions and their sensations” (US p. 478).
- c The dissent came to be accepted as the law after another four decades.

- d 27. When the right to personal privacy came up for consideration in *Griswold v. State of Connecticut*¹⁰, in the absence of a specific provision in the US Constitution, the Court traced the right to privacy as an emanation from the right to freedom of expression and other rights. In that case, Douglas, J. observed that the right to freedom of speech and press included not only the right to utter or to print, but also the right to distribute, the right to receive, and the right to read and that without these *peripheral rights*, the specific right would be less secure and that likewise, the other specific guarantees in the Bill of Rights have *penumbras*, forced by emanations from those guarantees which help give them life and substance. It was held that the various guarantees created *zones of privacy* and that protection against all government invasions “of the sanctity of man’s house and the privacies of life” was fundamental. The learned Judge stated (US p. 494) that “privacy is a fundamental *personal right*, emanating ‘from the totality of the constitutional scheme under which we (Americans) live’ ”.
- e

- f 28. The shift from property to person was clearly declared in *Warden v. Heyden*¹¹, US at p. 304 as follows:

“... the premise that property interests control the right of the Government to search and seize has been discredited.... We have recognised that the principal object of the Fourth Amendment is the protection of privacy rather than property, and have increasingly discarded fictional and procedural barriers rested on property concepts.”

g ***Katz and “reasonable expectation of privacy”***

29. Thereafter, in *Katz v. United States*¹² there was a clearer enunciation when the majority laid down that the Fourth Amendment protected “people

h 9 277 US 438 : 72 L Ed 944 (1928)
10 381 US 479 : 14 L Ed 2d 510 (1965)
11 387 US 294 (1967)
12 389 US 347 : 19 L Ed 2d 576 (1967)

and not places". Harlan, J. in his concurring opinion said, — in a passage which has been held to be the distillation of the majority opinion — that the Fourth Amendment scrutiny would be triggered whenever official investigative activity invaded "a reasonable expectation of privacy". Although the phrase came from Justice Harlan's separate opinion, it is treated today as the essence of the majority opinion (*Terry v. Ohio*¹³). [See *Constitution and Criminal Procedure, First Principles* by Prof. Akhil Amar, Yale University Press (1997), p. 183, fn 42.]

30. Stevens, J. in *Thornburgh v. American College of O&G*¹⁴ observed that "the concept of privacy embodies the moral fact that a person belongs to himself and not to others nor to society as a whole". The same learned Judge had said earlier in *Whalen v. Roe*¹⁵ (US pp. 599-600) that the right embraces both a general "individual interest in avoiding disclosure of personal matters" (emphasis supplied) and a similarly general, — but nonetheless distinct — "interest in independence in making certain kinds of important decisions". Fried says in *Privacy* (1968), Yale Law Journal 475 (at p. 477) that physical privacy is as necessary to "relations of the most fundamental sort ... respect, love, friendship and trust" as "oxygen is for combustion". A commentator in (1976) 64 Cal L. Rev. 1447 says that privacy centres round values of repose, sanctuary and intimate decision. Repose refers to freedom from unwanted stimuli; sanctuary to protection against intrusive observation; and intimate decision, to autonomy with respect to the most personal of life's choices. [Prof. Lawrence H. Tribe's treatise, *American Constitutional Law* (1988), 2nd Edn., Ch. 15.]

31. Prof. Tribe says (*ibid.*, p. 1306) that to make sense for constitutional law out of the smorgasbord of philosophy, sociology, religion and history upon which our understanding of humanity subsists, we must turn from absolute propositions and dichotomies so as to place each allegedly protected act and each illegitimate intrusion, in a social context related to the Constitution's text and structure. He says (p. 1307) that "exclusion of illegitimate intrusions into privacy depends on the nature of the right being asserted and the way in which it is brought into play; it is at this point that context becomes crucial — to inform substantive judgment". If these factors are relevant for defining the right to privacy, they are quite relevant — whenever there is invasion of that right by way of searches and seizures at the instance of the State. In New Zealand, in the watershed case of *R. v. Jeffries*¹⁶ Robertson, J. stated that the reasonableness of a search and seizure would depend upon the subject-matter and the unique combination of "time, place and circumstances". The Court made a distinction between illegality and reasonableness of the search or seizure, in the context of Section 21 of the NZ Bill of Rights, 1990. It said "a search may be legal but unreasonable; it

13 392 US 1 (1968)

14 476 US 747 (1986)

15 429 US 589 : 51 L Ed 2d 64 (1977)

16 (1994) 1 NZLR 290 (CA)

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- a may be illegal but reasonable". Probably, what was meant was that a search under a court warrant may be lawful but the manner in which it is executed may be unreasonable. Likewise, there may be very rare exceptions where a search and seizure operation is conducted without a warrant on account of a sense of grave urgency for preventing danger to life or property or where delay in procuring a warrant may indeed result in the evidence vanishing but still the search or seizure might have been conducted in a reasonable manner.

- b 32. As to privacy of the home, the same has been elaborated. Chief Justice Burger stated in *United States v. Orto*¹⁷ that the Constitution extends special safeguards to the privacy of the home, just as it protects other special privacy rights such as those of marriage, procreation, motherhood, childbearing and education. Prof. Tribe states (p. 1412) that indeed, privacy of the home has the longest constitutional pedigree of the lot, "for the sanctity of the home ... has been embedded in our traditions since the origins of the Republic"; when we retreat across the threshold of the home, inside, the Government must provide escalating justification if it wishes to follow, monitor or control us there. In *Stanley v. Georgia*¹⁸ it was declared that however free the State may be to ban the *public* dissemination of constitutionally unprotected obscene materials, the State cannot criminalise the purely *private* possession of such material at home — "[A] State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch." (US p. 565)

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d
e 33. The above discussion shows that in the United States principles regarding protection of privacy of the home have been put on strong basis and the right is treated as a personal right distinct from a right to property. The right is, however, not absolute though any intrusion into the right must be based upon probable cause as stated in the Fourth Amendment.

- f 34. Intrusion into privacy may be by — (1) legislative provisions, (2) administrative/executive orders, and (3) judicial orders. The legislative intrusions must be tested on the touchstone of reasonableness as guaranteed by the Constitution and for that purpose the court can go into the proportionality of the intrusion vis-à-vis the purpose sought to be achieved. (2) So far as administrative or executive action is concerned, it has again to be reasonable having regard to the facts and circumstances of the case. (3) As to judicial warrants, the court must have sufficient reason to believe that the search or seizure is warranted and it must keep in mind the extent of search or seizure necessary for the protection of the particular State interest. In addition, as stated earlier, common-law-recognised rare exceptions such as where warrantless searches could be conducted but these must be in good faith, intended to preserve evidence or intended to prevent sudden danger to person or property.

- h
17 413 US 139 (1973)
18 394 US 557 : 22 L. Ed 2d 542 (1969)

Development of law in India

35. The earliest case in India to deal with “privacy” and “search and seizure” was *M.P. Sharma v. Satish Chandra*¹⁹ in the context of Article 19(1)(f) and Article 20(3) of the Constitution. The contention that search and seizure violated Article 19(1)(f) was rejected, the Court holding that a mere search by itself did not affect any right to property, and though seizure affected it, such effect was only temporary and was a reasonable restriction on the right. The question whether search warrants for the seizure of documents from the accused were unconstitutional was not gone into. The Court, after referring to the American authorities, observed that in the US, because of the language in the Fourth Amendment, there was a distinction between legal and illegal searches and seizures and that such a distinction need not be imported into our Constitution. The Court opined that a search warrant was addressed to an officer and not to the accused and did not violate Article 20(3). In the present discussion the case is of limited help. In fact, the law as to privacy was developed in later cases by spelling it out from the right to freedom of speech and expression in Article 19(1)(a) and the right to “life” in Article 21.

36. Two later cases decided by the Supreme Court of India where the foundations for the right were laid, concerned the intrusion into the home by the police under State regulations, by way of “domiciliary visits”. Such visits could be conducted any time, night or day, to keep a tab on persons for finding out suspicious criminal activity, if any, on their part. The validity of these regulations came under challenge. In the first one, *Kharak Singh v. State of U.P.*²⁰ the U.P. Regulations regarding domiciliary visits were in question and the majority referred to *Munn v. Illinois*²¹ and held that though our Constitution did not refer to the right to privacy expressly, still it can be traced from the right to “life” in Article 21. According to the majority, clause 236 of the relevant Regulations in U.P., was bad in law; it offended Article 21 inasmuch as there was no law permitting interference by such visits. The majority did not go into the question whether these visits violated the “right to privacy”. But, Subba Rao, J. while concurring that the fundamental right to privacy was part of the right to liberty in Article 21, part of the right to freedom of speech and expression in Article 19(1)(a), and also of the right to movement in Article 19(1)(d), held that the Regulations permitting surveillance violated the fundamental right of privacy. In the discussion the learned Judge referred to *Wolf v. Colorado*²². In effect, all the seven learned Judges held that the “right to privacy” was part of the right to “life” in Article 21.

37. We now come to the second case, *Gobind v. State of M.P.*²³ in which Mathew, J. developed the law as to privacy from where it was left in *Kharak*

19 1954 SCR 1077 : 1954 Cri LJ 865

20 (1964) 1 SCR 332 : (1963) 2 Cri LJ 329

21 94 US 113 : 24 L Ed 77 (1877)

22 338 US 25 : 93 L Ed 1782 (1949)

23 (1975) 2 SCC 148 : 1975 SCC (Cri) 468

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- Singh*²⁰. The learned Judge referred to *Griswold v. Connecticut*¹⁰ where Douglas, J. referred to the theory of penumbras and peripheral rights and had stated that the right to privacy was implied in the right to free speech and could be gathered from the entirety of fundamental rights in the constitutional scheme, for, without it, these rights could not be enjoyed meaningfully. Mathew, J. also referred to *Jane Roe v. Henry Wade*²⁴ where it was pointed out (SCC p. 155, para 18) that though the right to privacy was not specifically referred to in the US Constitution, the right did exist and
- a “roots of that right may be found in the First, Fourth and Fifth Amendments, in the penumbras of the Bill of Rights, in the Ninth Amendment, and in the concept of liberty guaranteed by the first section of the Fourteenth Amendment”.
- Mathew, J. stated that, however, the “right to privacy was not absolute” and that the makers of our Constitution wanted to ensure conditions favourable to
- c the pursuit of happiness as explained in *Olmstead v. United States*⁹, US at p. 471; the privacy right can be denied only when an “important countervailing interest is shown to be superior”, or where a compelling State interest was shown. (Mathew, J. left open the issue whether moral interests could be relied upon by the State as compelling interests). Any right to privacy, the learned Judge said (see para 24), must encompass and protect the
- d personal intimacies of the home, the family, marriage, motherhood, procreation and child-bearing. This list was however not exhaustive. He explained (see para 25) that, if there was State intrusion there must be “a reasonable basis for intrusion”. The right to privacy, in any event (see para 28), would necessarily have to go through a process of case-by-case development.
- e 38. Coming to the particular U.P. Regulations 855 and 856, in question in *Gobind*²³, Mathew, J. examined their validity (see para 30). These, according to him, gave large powers to the police and needed, therefore, to be read down, so as to be in harmony with the Constitution, if they had to be saved at all. “Our Founding Fathers were thoroughly opposed to a Police Raj!” he said. Therefore, the Court must draw boundaries upon these police powers so
- f as to avoid breach of constitutional freedoms. While it could not be said that all domiciliary visits were *unreasonable* (see para 31), still while interpreting them, one had to keep the character and antecedents of the person who was under watch as also the objects and limitations under which the surveillance could be made. The right to privacy could be restricted on the basis of
- g *compelling public interest*. The learned Judge noticed that unlike non-statutory regulations in *Kharak Singh*²⁰, here Regulation 856 was “law” (being a piece of subordinate legislation) and hence it could not be said in this case that Article 21 was violated for lack of legislative sanction. The law was very much there in the form of these Regulations. Regulations 853(1) and 857 prescribed a procedure that was “reasonable”. So far as Regulation 856 was concerned, it only imposed reasonable restrictions within Article
- h 19(5) and there was, even otherwise, a compelling State interest. Regulations

853(1) and 857 referred to a class of persons who were *suspected* as being habitual criminals, while Regulation 857 classified persons who could reasonably be held to have criminal tendencies. Further Regulation 855 empowered surveillance only of persons against whom *reasonable materials* existed for the purpose of inducing an opinion that they show a determination to lead a life of crime. The Court thus read down the Regulations and upheld them for the above reasons. a

39. We have referred in detail to the reasons given by Mathew, J. in *Gobind*²³ to show that, the right to privacy has been implied in Articles 19(1)(a) and (d) and Article 21; that, the right is not absolute and that any State intrusion can be a reasonable restriction only if it has *reasonable basis* or *reasonable materials* to support it. b

40. A two-Judge Bench in *R. Rajagopal v. State of T.N.*²⁵ held the right of privacy to be implicit in the right to life and liberty guaranteed to the citizens of India by Article 21. "It is the right to be let alone." Every citizen has a right to safeguard the privacy of his own. However, in the case of a matter being part of public records, including court records, the right of privacy cannot be claimed. The right to privacy has since been widely accepted as implied in our Constitution, in other cases, namely, *People's Union for Civil Liberties v. Union of India*²⁶, *'X' v. Hospital 'Z'*²⁷, *People's Union for Civil Liberties v. Union of India*²⁸ and *Sharda v. Dharmpal*²⁹. c

The impugned provision of the A.P. Amendment on anvil d

41. It is in the background of the above, the validity of Section 73 of the Stamp Act, 1899 falls to be decided.

42. The text of Section 73, Indian Stamp Act and the text as amended in its application to the State of A.P. have been set out in the earlier part of the judgment. e

43. It will be seen that under Section 73, the Collector could inspect the "registers, books, records, papers, documents or proceedings" in the public office. Obviously, this meant that the inspection must relate to "public documents" in the custody of the public officer or to public record of private documents available in his office. The inspection could be carried out only by a person authorised — in writing — by the Collector. The purpose of inspection has to be specific and has to be based upon a belief that (i) such inspection may tend to secure any (stamp) duty, or (ii) it may tend to prove any fraud or omission in relation to any duty, or (iii) it may tend to lead to the discovery of any fraud or omission in relation to any duty. f

44. The above provisions have remained in Section 73 even after the A.P. Amendment of 1986. The validity of the unamended provisions of Section 73 of the Stamp Act, 1899 is not in issue before us. It is a pre-constitutional law. It is obvious that in its operation after the commencement of the Constitution, g

25 (1994) 6 SCC 632

26 (1997) 1 SCC 301

27 (1998) 8 SCC 296

28 (2003) 4 SCC 399

29 (2003) 4 SCC 493

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even the unamended Section 73 must conform to the provisions of Part III of our Constitution.

- a 45. When public record in the Sub-Registrar's Office or a bank or for that matter any other public office is inspected for the purposes referred to in the impugned Section 73, the public officer may indeed have no objection to such inspection. But, as in the case before us, in the context of a bank which either holds the private documents of its customers or copies of such private documents, the question arises whether disclosure of the contents of the documents by the bank would amount to a breach of confidentiality and would, therefore, be violative of privacy rights of its customers?

Bank and its customers — confidentiality of relationship

- c 46. It cannot be denied that there is an element of confidentiality between a bank and its customers in relation to the latter's banking transactions. Can the State have unrestricted access to inspect and seize or make roving inquiries into all bank records, without any reliable information before it prior to such inspection? Further, can the Collector authorise "any person" whatsoever to make the inspection, and permit him to take notes or extracts? These questions arise even in relation to Section 73 and have to be decided in the context of privacy rights of customers.

- d 47. There has been a great debate in the US about privacy in respect of bank records and inspection thereof by the State. In *United States v. Miller*³⁰ the majority of the Court laid down that once a person passes on cheques, etc. to a bank, which indeed is in a position of a third party, the right to privacy of the document is no longer protected. In that case, the respondent, who had been charged with various federal offences, made a pre-trial motion to suppress microfilms of cheques, deposit slips and other records relating to his accounts with two banks, which maintained records relating to the (US) Bank Secrecy Act, 1970. He contended that the *subpoenas duces tecum* pursuant to which the material had been produced by the banks, were defective and that the records had thus been illegally seized in violation of the Fourth Amendment. The request was denied by the trial court, the respondent was tried and convicted. The Court of Appeals reversed the conviction, holding that the subpoenaed documents fell within the constitutionally protected zone of privacy. On further appeal, the US Supreme Court restored the conviction holding that, once the documents reached the hands of a third party, namely, the bank, the respondent ceased to possess any Fourth Amendment interest in the bank records that could be vindicated by a challenge to the subpoenas, that the materials were *business records of the banks and not the respondent's private papers*; that, there was no legitimate "expectation of privacy" (as stated in *Katz*¹²) in the contents of the original cheques and deposit slips, since the cheques were "not confidential communications" but negotiable instruments to be used in commercial transactions and the documents contained only information voluntarily conveyed to the banks which was exposed to the employees in the ordinary course of business. The Court laid down a new principle of "assumption of risk". It said the "depositor takes the

risk, in revealing his affairs to another". The Court declared that the Fourth Amendment did not prohibit the obtaining of information *revealed to a third party and conveyed* by that party to government authorities. Once the person who had the privacy right "assumed the risk" of the information being conveyed to the outside world by the bank, he could make no kind of complaint.

48. The above decision led to a serious criticism by jurists [see (A) below] that the broad proposition, namely, that once a person conveyed confidential documents to a third party, he would lose his privacy rights, was wrong and was based on the old concept of treating the right of privacy as one attached to property whereas the Court had, in *Katz*¹² accepted that the privacy right protected "individuals and not places"; Congress came forward with the Right to Financial Privacy Act, 1978 (Pub L No. 95-630) which provided several safeguards to secure privacy, namely, requiring reasonable cause and also enabling the customer to challenge the summons or warrant in a court of law before it could be executed; [see (B) below]. (We do not mean to say that any law which is not on those lines is invalid. Indian laws such as Section 132, etc. of the Indian Income Tax Act, 1961; or Sections 91, 165 and 166 of the Criminal Procedure Code, 1973 as to search and seizure have, as stated below, been extensively considered by the courts in India and have been held to be valid.)

(A) Criticism of Miller

(i) The majority in *Miller*³⁰ laid down that a customer who has conveyed his affairs to another had thereby lost his privacy rights. Prof. Tribe states in his treatise (see p. 1391) that this theory reveals "alarming tendencies" because the Court has gone back to the old theory that privacy is in relation to property while it has laid down that the right is one attached to the person rather than to property. If the right is to be held to be not attached to the person, then "we would not shield our account balances, income figures and personal telephone and address books from the public eye, but might instead go about with the information written on our 'foreheads or our bumper stickers' ". He observes that the majority in *Miller*³⁰ confused "privacy" with "secrecy" and that "even their notion of secrecy is a strange one, for a *secret remains a secret even when shared with those whom one selects for one's confidence*". Our cheques are not merely negotiable instruments but yet the world can learn a vast amount about us by knowing how and with whom we have spent our money. Same is the position when we use the telephone or post a letter. To say that one assumes great risks by opening a bank account appeared to be a wrong conclusion. Prof. Tribe asks a very pertinent question (p. 1392):

"Yet one can hardly be said to have *assumed a risk* of surveillance in a context where, as a practical matter, one had no choice. Only the most committed — and perhaps civilly committable — *hermit can live without a telephone, without a bank account, without mail*. To say that one must take a bitter pill with the sweet when one licks a stamp is to exact a high constitutional price indeed for living in contemporary society."

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He concludes (p. 1400):

- a "In our information-dense technological era, when living inevitably entails leaving not just informational footprints but parts of one's self in myriad directories, files, records and computers, to hold that the Fourteenth Amendment did not reserve to individuals some power to say *when and how and by whom* that information and those confidences were to be used, would be to denigrate the central role that informational autonomy must play in any developed concept of the self."
- b (ii) Prof. Yale Kamisar (again quoted by Prof. Tribe) (p. 1392) says:
"It is beginning to look as if the only way someone living in our society can avoid '*assuming the risk*' that various intermediate institutions will reveal information to the police is by engaging in drastic discipline, the kind of discipline of life under *totalitarian regimes*."
- c This reminds us of what Mathew, J. said in *Gobind*²³, that we are not living in a Police Raj.
(iii) Richard Alexander, a jurist-lawyer in an article published in South West University Law Review (1978), Vol. 10 (pp. 13-33), titled "*Privacy, Banking Records and Supreme Court: A Before and After Look at Miller*"³⁰, says:
d "The Supreme Court (in *Miller*³⁰) followed the old property interest line of analysis under the Fourth Amendment, ... such confidentiality is due to the long-standing recognition that the information contained in such records is highly personal.... In the light of the liberty given to the Government to inspect banking records through use of administrative summonses, it is impossible to reconcile *Miller*³⁰ with *Katz*¹² and *Griswold*¹⁰.... The United States Supreme Court rejected the *Katz*'s¹²
e 'justifiable expectation of privacy' analysis and opted for a mechanical 'property interest' analysis which is unwieldy in its application to twentieth century technology."
(iv) Polyviou G. Polyviou in his book *Search and Seizure* (Duckworth, 1982) in an exhaustive discussion on *Miller*³⁰ (pp. 67 to 71) concludes that
f "*Miller*³⁰, partly through reliance on property considerations and partly through insensitive application of a rigid 'misplaced confidence' doctrine, has brought about a 'highly questionable' gap in Fourth Amendment coverage".
(v) La Fave in his book *Search and Seizure* (1978) (quoted by Polyviou) calls the *Miller*³⁰ decision as "pernicious" and characterises its reasoning as "woefully inadequate".
g (vi) Profs. Jackson and Tushnet in *Comparative Constitutions Law* (2001) say (p. 404) that "in the USA the Fourth Amendment to the Constitution bars police from conducting 'unreasonable' searches, but the Supreme Court has been willing to stamp nearly every troublesome form of police activity as either not a search or not unreasonable. *Oddly enough, the Court has made the law in this area nearly unintelligible....*"
h (vii) In this connection, two other articles, the *Note, Government Access to Bank Records* (1974) 83 YALE LAW JOURNAL 1439 and *A Bank Customer*

has no Reasonable Expectation of Privacy of Bank Records: United States v. Miller, 14 San Diego L. Rev. 414 (1977) are also relevant (quoted by Polyviou G. Polyviou, p. 67). a

(B) Response to Miller by Congress

We shall next refer to the response by Congress to *Miller*³⁰. (As stated earlier, we should not be understood as necessarily recommending this law as a model for India.) Soon after *Miller*³⁰, Congress enacted the Right to Financial Privacy Act, 1978 (Public Law No. 95-630) 12 USC with Sections 3401 to 3422). The statute accords customers of banks or similar financial institutions, certain rights to be notified of and a right to challenge the actions of Government in court at an anterior stage before disclosure is made. Section 3401 of the Act contains "definitions". Section 3402 is important, and it says that "except as provided by Section 3403(c) or (d), 3413 or 3414, no government authority may have access to or obtain copies of, or the information contained in the financial records of any customer from a financial institution unless the financial records are reasonably described and that (1) such customer has authorised such disclosure in accordance with Section 3404; (2) such records are disclosed in response to (a) administrative subpoenas or summons to meet requirement of Section 3405; (b) the requirements of a search warrant which meets the requirements of Section 3406; (c) requirements of a judicial subpoena which meets the requirement of Section 3407; or (d) the requirements of a formal written requirement under Section 3408. If the customer decides to challenge the Government's access to the records, he may file a motion in the appropriate US District Court, to prevent such access. The Act also provides for certain specific exceptions. b

49. While we are on (B), it is necessary to make a brief reference to Section 93(1) of the Code of Criminal Procedure, 1973 which deals with power of the court to issue "search warrants" (a) where the court has "reason to believe" that a person to whom a summons or order under Section 91 or a requisition under Section 92(1) has been, or might be, addressed, will not or would not produce the document or thing as required by summons or requisition, or (b) where such document or thing is not known to the court to be in the possession of any person, or (c) where the court considers that the purposes of any inquiry, trial or other proceeding under the Code, will be served by a general search or inspection, it may issue a search warrant; and the person to whom such warrant is directed, may search or inspect in accordance therewith and the provisions contained in the Code. Under Section 93(2), the court may, if it thinks fit, specify in the warrant, the place or part thereof to which only the search or inspection shall extend; and the person charged with the execution of such warrant shall then search or inspect only the place or part so specified. Under Section 93(2), a warrant to search for a document, parcel or other thing in the custody of the postal or telegraph authority, has to be issued by the District Magistrate or the Chief Judicial Magistrate. c

50. Section 165 of the Code deals with the power of a police officer to search. Under Section 165(1) he must have *reasonable grounds for believing* that anything necessary for the purpose of an investigation into any offence, d

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a which he is authorised to investigate, may be found in any place within the limits of the police station and that such thing cannot, in his opinion, be otherwise obtained without undue delay. He has to *record* the grounds of his belief in writing and specify, so far as possible, the thing for which search is made. Section 166 refers to the question as to when an officer in charge of a police station may require another to issue search warrant.

b 51. In the Income Tax Act, 1961 elaborate provisions are made in regard to "search and seizure" in Section 132; power to requisition books of account, etc. in Section 132-A; power to call for information as stated in Section 133. Section 133(6) deals with power of officers to require any bank to furnish any information as specified there. There are safeguards. Section 132 uses the words "in consequence of *information* in his possession, *has reason to believe*". (emphasis supplied) Section 132(1-A) uses the words "in consequence of information in his possession, has reason to suspect". Section c 132(13) says that the provisions of the Code of Criminal Procedure, relating to searches and seizure shall apply, so far as may be, to searches and seizures under Sections 132(1) and 132(1-A). There are also Rules made under Section 132(14). Likewise Section 132-A(1) uses the words "in consequence of *information* in his possession, *has reason to believe*". (emphasis supplied) Section 133 which deals with the power to call for information from banks and others uses the words "*for the purposes of this Act*" and Section 133(6) d permits a requisition to be sent to a bank or its officer. There are other Central and State statutes dealing with procedure for "search and seizure" for the purposes of the respective statutes.

e 52. Under all these enactments, there are several judgments of this Court explaining the scope of the provisions, and the safeguards provided by those provisions while upholding their constitutional validity and pointing out their limitations. It is not necessary in this case to refer to those judgments. Suffice it to say that, in the present case we are concerned mainly with the validity of Section 73 of the Stamp Act, as amended in its application in 1986 in Andhra Pradesh.

f 53. Once we have accepted in *Gobind*²³ and in later cases that the right to privacy deals with "persons and not places", the documents or copies of documents of the customer which are in a bank, must continue to remain confidential vis-à-vis the person, even if they are no longer at the customer's house and have been voluntarily sent to a bank. If that be the correct view of the law, we cannot accept the line of *Miller*³⁰ in which the Court proceeded on the basis that the right to privacy is referable to the right of "property" theory. Once that is so, then unless there is some probable or reasonable g cause or reasonable basis or material before the Collector for reaching an opinion that the documents in the possession of the bank tend to secure any duty or to prove or to lead to the discovery of any fraud or omission in relation to any duty, the search or taking notes or extracts therefore, cannot be valid. The above safeguards must necessarily be read into the provision relating to search and inspection and seizure so as to save it from any h unconstitutionality.

54. Secondly, the impugned provision in Section 73 enabling the Collector to authorise "any person" whatsoever to inspect, to take notes or extracts from the papers in the public office suffers from the vice of excessive delegation as there are no guidelines in the Act and more importantly, the section allows the facts relating to the customer's privacy to reach non-governmental persons and would, on that basis, be an unreasonable encroachment into the customer's rights. This part of Section 73 permitting delegation to "any person" suffers from the above serious defects and for that reason is, in our view, unenforceable. The State must clearly define the officers by designation or state that the power can be delegated to officers not below a particular rank in the official hierarchy, as may be designated by the State.

55. The A.P. Amendment permits inspection being carried out by the Collector by having access to the documents which are in *private custody* i.e. custody other than that of a public officer. It is clear that this provision empowers invasion of the home of the person in whose possession the documents "tending" to or leading to the various facts stated in Section 73 are in existence and Section 73 being one without any safeguards as to probable or reasonable cause or reasonable basis or materials violates the right to privacy both of the house and of the person. We have already referred to *R. Rajagopal case*²⁵ wherein the learned Judges have held that the right to personal liberty also means life free from encroachments unsustainable in law, and such right flowing from Article 21 of the Constitution.

56*. In *Maneka Gandhi v. Union of India*³¹ a seven-Judge Bench decision, P.N. Bhagwati, J. (as His Lordship then was) held that the expression "personal liberty" in Article 21 is of the widest amplitude and it covers a variety of rights which go to constitute the personal liberty of man and some of them have been raised to the status of distinct fundamental rights and given *additional protection* under Article 19 (emphasis supplied). Any law interfering with personal liberty of a person must satisfy a triple test: (i) it must prescribe a procedure; (ii) the procedure must withstand the test of one or more of the fundamental rights conferred under Article 19 which may be applicable in a given situation; and (iii) it must also be liable to be tested with reference to Article 14. As the test propounded by Article 14 pervades Article 21 as well, the law and procedure authorising interference with personal liberty and right of privacy must also be right and just and fair and not arbitrary, fanciful or oppressive. If the procedure prescribed does not satisfy the requirement of Article 14 it would be no procedure at all within the meaning of Article 21.

57. The constitutional validity of the power conferred by law came to be decided from yet another angle in the case of *Air India v. Nergesh Meerza*³² wherein it was held that a discretionary power may not necessarily be a discriminatory power but where a statute confers a power on an authority to

* Ed.: Para 56 corrected vide Official Corrigendum No. F.3/Ed.B.J./8/2005 dated 17-1-2005.

31 (1978) 1 SCC 248

32 (1981) 4 SCC 335 : 1981 SCC (L&S) 599

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decide matters of moment without laying down any guidelines or principles or norms, the power has to be struck down as being violative of Article 14.

- a 58. An instrument which is not duly stamped cannot be received in evidence by any person who has authority to receive evidence and it cannot be acted upon by that person or by any public officer. This is the penalty which is imposed by law on the person who may seek to claim any benefit under an instrument if it is not duly stamped. Once detected, the authority competent to impound the document can recover not only duty but also
- b penalty, which provision protects the interest of revenue. In the event of there being criminal intention or fraud, the persons responsible may be liable to be prosecuted. The availability of these provisions, in our opinion, adequately protects the interest of revenue. Unbridled power available to be exercised by any person whom the Collector may think proper to authorise, without laying down any guidelines as to the persons who may be authorised and without
- c recording the availability of grounds which would give rise to the belief, on the existence whereof only, the power may be exercised, deprives the provision of the quality of reasonableness. Possessing a document not duly stamped is not by itself any offence. Under the garb of the power conferred by Section 73 the person authorised may go on a rampage searching house
- d after house i.e. residences of the persons or the places used for the custody of documents. The possibility of any wild exercise of such power may be remote, but then on the framing of Section 73, the provision impugned herein, the possibility cannot be ruled out. Any number of documents may be inspected, may be seized and may be removed and at the end the whole exercise may turn out to be an exercise in futility. The exercise may prove to be absolutely disproportionate to the purpose sought to be achieved and,
- e therefore, a reasonable nexus between stringency of the provision and the purpose sought to be achieved ceases to exist.

- f 59. The abovesaid deficiency pointed out by the High Court and highlighted by the learned counsel for the respondents in this Court has not been removed even by the Rules. The learned counsel for the respondents has pointed out that under the Rules the obligation is cast on the bank or any other person having custody of the documents though it may not be a party to the document, to pay the duty payable on the documents in order to secure release of the documents.

- g 60. For the foregoing reasons we agree with the view taken by the High Court that Section 73 of the Indian Stamp Act as amended in its application to the State of Andhra Pradesh by Andhra Pradesh Act 17 of 1986 is ultra vires the Constitution. As we do not find any infirmity in the judgment of the High Court all the appeals are dismissed.